

A
S Y S T E M
OF THE LAW OF
MARINE INSURANCES.

WITH THREE CHAPTERS,
ON BOTTOMRY,
ON INSURANCES ON LIVES,
ON INSURANCES AGAINST FIRE.

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Lex (de quâ agimus) est fons aequitatis. CICERO.

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CHAPTER THE FOURTEENTH.

Of Wager-Policies.

HAVING in the four preceding chapters stated the various cases, in which the contract of insurance is void from its very commencement, on account of its repugnancy to those principles of justice, equity, and good faith, which are the great foundation of all contracts between man and man; we proceed to treat of those policies, which by the positive statute law of the country are declared to be absolutely null and void. Of these the largest class are wager-policies, or policies as they are called, upon interest or no interest.

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The nature of the contract of insurance, in its original state, was, that a specifick voyage should be performed free from perils; and in case of accidents, during such voyage, the insurer, in consideration of the premium he received, was to bear the merchant harmless. It followed from thence, that the contract related to the safety of the voyage thus particularly described, in respect either of ship or cargo: and that the person insured could not recover beyond the amount of his real loss.

In process of time, however, variations were made, by express agreement, from the first kind of policy; and in cases where the trader did not think it proper to disclose the nature of his interest, the insurer dispensed with the insured having any interest either in the ship or cargo. In this last kind of policy (of which we are now to treat) "valued free from average," and "interest or no interest," it is manifest, that the performance of the voyage or adventure, in a reasonable time and manner, and not the bare existence of the ship or cargo, is the object of the insurance.

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Assievedo v.
Cambridge,
10 Mod. 77.
Goddard v.
Garrett,
2 Vern. 269.

Such an object as that, from a reference to the real nature of an insurance, as stated in the outset of the chapter, namely, that it is a contract of indemnity from a real and manifest, not from a supposed and ideal loss, must have been originally bad. Indeed it has been declared from the bench, prior to the discussion of *Assievedo v. Cambridge*, in the reign of queen *Anne*, that such insurances were formerly bad; for it is taken for granted in 1692 to be settled law, that in former times, if one had no interest, though the policy ran, *interest or no interest*, the insurance was void; because insurances were made for the benefit of trade, and not that persons unconcerned therein, or uninterested in the subject matter, should profit by them.

Depaiba v.
Ludlow,
Comyn's
Rep. 360.

The idea thus started seems to receive some confirmation from the counsel, and was not contradicted by the Court in the case of *Depaiba v. Ludlow*, for the counsel there observed, that insurances upon interest or no interest were introduced *since* the revolution.

2 Mag. 70.
65. 88. 189.
257.

If this was the law of *England* in this respect, previous to the revolution, as these cases suppose it to be, it was consonant to the positive laws of most of the commercial states and countries in *Europe*. For we find that by positive regulations of *Middle-bourg*, *Genoa*, *Konyngsburg*, *Rotterdam*, and *Stockholm*, all insurances upon wagers, or as interest or no interest, are declared to be absolutely void, and of no effect.

But though this mode of insuring gained footing in *England*, yet when introduced, the courts of justice looked upon these contracts with a jealous eye; and by their determinations shewed the strong prejudices which they entertained against them. The courts of Equity in particular manifested that their inclination would lead them as much as possible to suppress such a species of contract: nay, that they still considered them as void. This is evident from two cases in *Vernon's Reports*.

Goddard v.
Garrett,
2 Vern. 269.
Trin. Term.
1692.

In one of them, the defendant had lent money on a bottomry bond, but had no interest in the ship or cargo; the money lent was 300*l.* and he insured 450*l.* on the ship; the plaintiff's bill was

was

was to have the policy delivered up, because the defendant was not concerned in point of interest as to the ship or cargo.

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Per curiam. Take it that the law is settled, that if a man has no interest, and insures, the insurance is void, though it be expressed in the policy, *interested or not interested*. The reason the law goes upon is, that insurances were made for the benefit of trade, and not that persons unconcerned therein, and who were not interested in the ship, should profit thereby; and *where one would have the benefit of the insurance, he must renounce all interest in the ship*. And the reason why the law allows that a man having some interest in the ship or cargo may insure more, or five times as much, is, that a merchant cannot tell how much or how little his factor may have in readiness to lade on board his ship. *Per Cur.* Decree the policy to be delivered up to be cancelled.

From the spirit of this decision it may likewise appear, that the Court of Chancery inclined to think, that an insurance made without the benefit of salvage to the insurer, was unconscientious, and a proper subject for relief in equity; for the Court expressly says, where one would have the benefit of the insurance, he must renounce all interest in the ship.

In another case also, which was on a policy of insurance on goods, by agreement valued at 600*l.* and the insured not to be obliged to prove any interest: the Lord Chancellor ordered the defendant to discover what goods he put on board; for although the defendant offered to renounce all interest to the insurers, yet it must be referred to the Master to examine the value of the goods saved, and to deduct it out of the value or sum of 600*l.* at which the goods were valued by the agreement.

Le Pyre
v. La R.
2 Vern. 716.
In Chancery,
Michaelmas
Term, 1746.

There was one very remarkable difference between policies upon interest, and such as were not, of which I believe notice has already been taken in a former part of this work: namely, that in policies upon interest, you recover for the loss actually sustained, whether it be total or partial: but upon a wager-policy, you can never recover but for a total loss. All the doctrine, which turns upon this distinction between interest and wager-policies was considered at much length by Lord Mansfield in the

2 Burr, 683.
Vide ante,
p. 197.

C H A P. famous cause of *Goss v. Withers*, to which we have had occasion
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Vide ante,
 c. I.

It has already been observed, that the security given to the insured was very considerably increased by the erection of two Assurance Companies, which were incorporated by royal charter in the year 1720; for the legislature had taken care that those corporations should have sufficient funds to answer any demands that might be made upon them, in the common course of business. But this additional security for the insured soon produced many dangerous and alarming consequences, which, if they had not been checked, would have proved very detrimental to the trade of this country. For instead of confining the business of insurances to real risks, and considering them merely as an indemnity to the fair dealer against any loss which he might sustain in the course of a trading voyage, which, as we have seen, was the original design of them; that practice, which only prevailed since the revolution, of insuring ideal risks, under the names of *interest or no interest, or without further proof of interest than the policy, or without benefit of salvage to the underwriters*, was increasing to an alarming degree, and by such rapid strides as to threaten the speedy annihilation of that lucrative and most beneficial branch of trade. All these various kinds of insurance just enumerated (and many others, which the ingenuity of bad men found no difficulty in devising), having no reference whatever to actual trade or commerce, were very justly considered as mere gaming or wager-policies: and therefore the legislature thought it necessary to give them an effectual check, and, by positive rules, to fix and ascertain what property or interest a merchant should be permitted to insure.

Accordingly an act of parliament, passed in the 19th year of the reign of king George the Second, intituled, “an act to regulate
 “ insurance on ships belonging to the subjects of Great Britain,
 “ and on merchandizes or effects laden thereon.” As this act is the most important and most extensive in the whole code of statute law, with regard to insurance, I shall now cite as much of it at length as relates to the present chapter, and afterwards the other clauses of it under those heads, to which they more immediately apply.

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19 Geo. II.
c. 37.

The causes which co-operated to induce the legislative body to pass such an act, are fully stated in the preamble. "Whereas it hath been found by experience, that the making assurances interest or no interest, or without further proof of interest than the policy, hath been productive of many pernicious practices, whereby great numbers of ships, with their cargoes, have either been fraudulently lost and destroyed, or taken by the enemy in time of war; and such assurances have encouraged the exportation of wool, and the carrying on many other prohibited and clandestine trades, which by means of such assurances have been concealed, and the parties concerned secured from loss, as well to the diminution of the publick revenue, as to the great detriment of fair traders; and by introducing a mischievous kind of gaming or wagering, under the pretence of assuring the risk on shipping, and fair trade, the institution and laudable design of making assurances hath been perverted; and that, which was intended for the encouragement of trade and navigation, has, in many instances, become hurtful of, and destructive to the same."

"For remedy whereof be it enacted, that no assurance or assurances shall be made by any person or persons, bodies corporate or politick, on any ship or ships belonging to his majesty, or any of his subjects, or on any goods, merchandizes, or effects, laden or to be laden on board of any such ship or ships, *interest or no interest, or without further proof of interest than the policy, or by way of gaming, or wagering, or without benefit of salvage to the assurer*; and that every such insurance shall be null and void to all intents and purposes." Sect. 1.

"Provided always, that assurance on private ships of war, fitted out by any of his majesty's subjects solely to cruize against his majesty's enemies, may be made by or for the owners thereof, interest or no interest, free of average, and without benefit of salvage to the assurer; any thing herein contained to the contrary thereof in any wise notwithstanding." Sect. 2.

"Provided also, that any merchandizes or effects from any ports or places in *Europe or America*, in the possession of the Sect. 3.

11 H. A. P. "crowns of *Spain* or *Portugal*, may be assured in such way and
 XIV. "manner, as if this act had not been made."

sect. 4. The fourth section relates to re-insurances, which will be the subject of the following chapter.

sect. 5. "And be it enacted, that all and every sum and sums of money to be lent on bottomry, or at *respondentia*, upon any ship or ships belonging to any of his majesty's subjects, bound to or from the *East Indies*, shall be lent only on the ship, or on the merchandize or effects laden, or to be laden, on board of such ship, and shall be so expressed in the condition of the said bond: and the benefit of salvage shall be allowed to the lender, his agents or assigns, *who alone shall have a right to make assurance on the money so lent*: and no borrower of money on bottomry or *respondentia*, as aforesaid, shall recover more on any insurance than the value of his interest in the ship, or in the merchandizes or effects laden on board of such ship, exclusive of the money so borrowed; and in case it shall appear, that the value of his share in the ship, or in the merchandizes or effects laden on board, doth not amount to the full sum or sums he had borrowed as aforesaid, such borrower shall be responsible to the lender for so much of the money borrowed, as he hath not laid out on the ship or merchandize laden thereon, with lawful interest for the same, together with the assurance, and all other charges thereon, in the proportion the money not laid out shall bear to the whole money lent, notwithstanding the ship and merchandizes be totally lost."

Upon this last section, of which we shall treat more fully in the chapter on Bottomry, it may be sufficient in this place to observe, that none but the lender shall have a right to make insurance on the money lent. It is also to be remarked, that this regulation of insurance on bottomry or *respondentia* interest, extends only to *East India* ships: and therefore, an insurance of a *respondentia* interest upon any other ships may be made in the same manner as they used to be before this act. It has also been decided upon this clause of the act, that it never meant or intended to make any alteration in the manner of insurances: and it was declared by the whole court in the case of *Glover v. Black*, which

which was fully reported in a former chapter, to be the established law and usage of merchants, that *respondentia* and bottomry must be mentioned and specified in the policy of insurance.

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Glover v.
Black.
3 Burr.
1304.
Vide ante,
c. 1. p. 12.

By the first section of the act it is clear that at this day all insurances made contrary to it are absolutely void and of no effect: which, as has already been shewn, was also the case by the ancient law of this country. It may now be material to consider first, what cases have, by the construction put by the learned judges upon this statute, been held not to fall within its description: and secondly, those which do, and in which, the policies have consequently been holden to be void.

It was formerly a matter of doubt, whether the act was meant to extend to insurances of foreign property, and on foreign ships. The better opinion, however, was, that it did not; for it was clear, that such insurances did not fall within the words of the statute; and from an attentive consideration of the preamble, they do not seem to come under the description of the mischiefs, against which it was the intention of the legislature to provide. But these doubts are entirely at an end by several decisions of the courts; and particularly by a case, in which it was expressly declared by the court (and the reason for it stated), that the act was not designed to extend to foreign ships.

The case was this: the policy was on goods, on board three French vessels, from *St. Domingo* to *Bordeaux*. The material part of it, as to this case, was in the following words: "On all goods loaden or to be loaden on board the ships *Le Soigneux*, *La Pucelle*, *Le Vainquer*, all or any of them. The said goods, and merchandizes by agreement are, and shall be valued at (a) on 25 casks of clayed sugar, and 12 hogsheds of muscavadoes: the policy to be deemed sufficient proof of interest, in case of loss." The first count in the declaration stated, that goods to a great amount, being the property of certain foreigners, had been shipped on board *Le Soigneux*, and that she had been lost. The second averred, that the goods were shipped on board the three ships, or some or one of them, to the

Thellusson
v. Fletcher.
Doug. 315.

(a) This was blank, as here printed.

C H A P. amount of the sum insured; and that two of them had been cap-
 XIV. tured, and the other lost.

This case came before the court upon a motion to set aside the writ of enquiry, which had been executed before the sheriff, after a judgment by default, on this ground: that the jury had assessed the damages to the amount of the defendant's subscription, without any proof of the amount or value or any evidence whatever, except that of the defendant's handwriting to the policy. In addition to this objection, an affidavit was produced, tending to shew, that in fact the insured had no interest. It was argued for the defendant, that by the express agreement of the parties, no other proof of interest but the policy was required; and this insurance on foreign ships and property was not within the statute prohibiting such policies; so that the plaintiff was entitled to recover the sum insured by the defendant, even if it could be proved that the insured had no property on board. The court said that this was not a policy within the statute, foreign ships not having been included in that act, on account of the difficulty of bringing witnesses from abroad to prove the interest. The only difficulty there could have been here, was from the circumstance of there having been three ships; but the second count was so framed, as to make the case the same, as if there had been but one. By suffering judgment to go by default, the defendant has confessed the plaintiff's title to recover; and the amount was fixed by the stipulation in the policy.

Crauford v.
 Hunter,
 8 Term Rep.
 10. See the
 same case,
 post. 360.
 Crauford v.
 Lucena,
 S. P.
 See 15 Geo.
 111. c. 80.

In a still more modern case, which was much discussed in two arguments, one of the points was, the insurance being on *Dutch* prize ships, whether a count in the declaration, averring that the plaintiffs as commissioners for the disposal of *Dutch* ships and effects made the insurance, and that the said ships, or any of them, were not belonging to his majesty, or any of his subjects, was good. This point came on upon a demurrer: and after argument,

Lord Kenyon said—"This question depends on the construction of the statute 19 Geo. 2. c. 37. for notwithstanding the argument, I think at common law a person might insure without having any interest; but the preamble and enacting part of the statute

statute remove all doubt; for the act recites the mischiefs and inconveniences that had arisen from the making of assurances interest or no interest, and then it enacts (not declaring) that no such assurance shall be made, except in certain cases, which for very wise and politic reasons were excepted. Therefore I am satisfied that this count is good, unless it be on an insurance prohibited by that statute. But that statute only applies to ships belonging to his majesty or any of his subjects, and does not extend to foreign ships. The defendant's counsel then wished us to consider these ships as belonging to the government of this country: but that cannot be, for the property in captured ships is not altered before condemnation in the court of Admiralty.

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It was formerly thought, that a *valued* policy was a wager-policy, like interest or no interest. But this idea is now exploded, as we shall presently shew by a solemn decision of the court of King's Bench. Of the difference between open and valued policies much has been already said; and the origin of the latter was derived from this source, it being sometimes troublesome to the trader to prove the value of his interest, or to ascertain the quantity of his loss, he gave the insurer a higher premium to agree to estimate his interest at a precise sum. To recover upon this kind of policy, the insured need only prove that he had an interest, without shewing the value. If indeed it appeared, or could be made appear, that the interest proved was merely a *cover* to a wager, in order to evade the statute, there is no doubt such a policy would be void.

Vide ante,
c. 1.

All this doctrine was very fully stated, and commented upon by Lord *Mansfield*, in giving judgment in a cause then depending in the court of King's Bench. "A valued policy," said his Lordship, "is not to be considered as a wager-policy, or like *interest or no interest*. If it were, it would be void by the act of 19 Geo. 2. c. 37. The only effect of the valuation is fixing the amount of the prime cost; just as if the parties had admitted it at the trial: but in every argument, and for every other purpose, it must be taken that the value was fixed in such a manner, as that the insured meant only to have an indemnity. If it be undervalued, the merchant himself stands insurer for the surplus. If it be much overvalued, it must be

Lewis v.
Rucker,
2 Burr.
1167.
Vide ante,
c. 6. p. 132.

"done

C H A P. " done with a bad view ; either to gain, contrary to the 19th of
 XIV. " the late king ; or with some view to a fraudulent loss : there-
 " fore an insured never can be allowed to plead in a court of
 " justice, that he has greatly overvalued, or that his interest
 " was a trifle only. It is settled, that upon valued policies the
 " merchant need only prove some interest, to take it out of
 " 19 Geo. 2. because the adverse party has admitted the value :
 " and if more were required, the agreed valuation would signify
 " nothing. But if it should come out in proof, that a man had
 " insured 2000*l.* and had interest on board to the value of a
 " cable only ; there never has been, and I believe there never
 " will be a determination, that by such an evasion the act of
 " parliament may be defeated. There are many conveniences
 " from allowing valued policies : but where they are used merely
 " as a cover to a wager, they would be considered as an evasion.
 " The effect of the valuation is only fixing conclusively the prime
 " cost. If it be an open policy, the prime cost must be proved :
 " in a valued policy it is agreed." For these reasons Lord *Mans-*
field held, that a valued policy is not void by the statute of the
 19 Geo. 2.

The passage just quoted at length was, in a subsequent case, referred to in the judgment of the court ; and the doctrine there advanced was adopted and confirmed.

Grant v.
 Parkinson
 Mich.
 22 Geo. III.
 10 B. R.

It was an action on a policy of insurance on the ship *Providence* at and from *Surinam*, or whatsoever other ports in the *West Indies* at which the ship might load, to *Quebec*. At the trial before Lord *Mansfield*, at the sittings after *Trinity Term* 1781, the principal question on the merits was, whether the plaintiff had an insurable interest. It was an insurance on the profits expected to arise on a cargo of molasses belonging to the plaintiff, who had a contract with government to supply the army with spruce beer. Lord *Mansfield* thought it an insurable interest. But the part of the case, which calls for our attention at present, was a clause declaring, " that in case of loss, it was agreed that the profits should be valued at 1000*l.* without any other voucher than the policy." This, it was insisted, rendered the policy void, as well within the letter, as within the spirit of the 19 Geo. 2*c.* 37.

Lord

Lord *Mansfield*, at the trial, inclined to think that the contract was a fair one; but still he could not get over the objection, the instrument being void on the face of it. His Lordship, however, saved the point for the opinion of the court, a verdict being entered for the plaintiff, subject to that reference.

In *Michaelmas* Term following, the matter came on to be heard; when after full argument at the bar,

Lord *Mansfield*, C. J. said: "I have, since the sittings at *Guildhall*, on further consideration, changed my opinion. I then thought the present policy within the act of parliament: I now think otherwise. On the construction of the act, it has uniformly been held, that a valued policy is not void. It is incumbent on the plaintiff to prove some interest; but it is not necessary to go into the whole value. In the case of *Lewis v. Rucker*, this doctrine was much considered."—[Here his Lordship read the words already reported, and then he proceeds thus] "This insurance is on the profits of a cargo, belonging to a man, having a contract to supply the army, and if it arise, the profits are pretty certain. The meaning of the policy is not to evade the act of parliament, but to avoid the difficulty of going into an exact account of the quantum. I cannot distinguish it from a valued policy; there is no pretence for saying it is a *wagering* one." The other judges concurred; and the *postea* was given to the plaintiff.

In a case before the late Lord *Kenyon*, where the interest was stated in the policy to be "on the commissions of the plaintiff as consignee of the cargo, valued at 1500*l.*", his lordship expressed a strong opinion, that this was a good insurable interest; but the matter being compromised, it did not come to any decision. Since that time, however, the question was brought in a more solemn manner for the opinion of the court upon a case reserved. The policy stated the insurance to be *on profits valued at 2000*l.** The declaration averred, and the fact was, that the insured was interested in the profits to arise, and be made, from the sale and disposal of the said cargo of goods. This case was twice argued at the bar, once in the time of Lord *Kenyon*, and after time taken to deliberate, the judgment of Mr. Justice *Grose*,

*Flint v. Le.
Metuier.
Sittings after
Hil. Term
1796, at
Guildhall.*

*Barclay
v. Cousins,
2 East's R.
544.*

C H A P. XIV. Mr. Justice *Le Blanc* and himself, was delivered in a very luminous and perspicuous manner by Mr. Justice *Lawrence*, who declared, in the close of it, that Lord *Kenyon* concurred in the judgment so pronounced. The decision was, that such profits were the subject of insurance, and the case is argued by his lordship upon general principles of commercial speculation; upon the opinions of foreign jurists, and upon the cases of *Grant v. Parkinson* above stated, and another, prior in point of time to it, namely, *Herwickson v. Margetson*, in *Michaelmas Term 1776*. But in such a case it is necessary to shew satisfactorily that the loss of profits arose from a peril insured against, such as perils of the sea, &c., not from the state of the market, for which the underwriters are not responsible. In short, it is incumbent on the assured to shew, as was observed by Mr. Justice *Lawrence*, in the case now referred to, that if there had been no shipwreck, there would have been some profit.

East's R.
549. note
(a).

Hodgson
v. Glover.
6 East. 316.

King v.
Glover,
2 New R.
206.

So also in the Common Pleas, after much deliberation, all the Judges of that court were of opinion that an *African* captain, who, besides his wages, was entitled for his trouble and attention in purchasing slaves on the coast of *Africa*, and selling and disposing of them in, the *West Indies*, to so much *per cent.*, and other privileges, had a good insurable interest in this remuneration.

In all the cases above quoted, there was something of certainty in the profits or commissions which the assured expected; and it appeared in them that by a peril insured he was prevented from enjoying the profit. But where not only the profits are an expectation, but the obtaining a cargo, out of which the commission is to arise, is also an expectation, such an insurance cannot be supported without entirely destroying the intention of the stat. 19. Geo. 2. ch. 37. The case in which the consideration, which I have just mentioned, occurred, was, in an assurance "on the ship *Friendship*, at and from *Bristol* to *St. Thomas's* " and *Jamaica*, and from thence back to *Dublin*, on commissions valued at 1000*l.*" The admitted facts were, that the plaintiff and one *Alexander Robt.* of *Bristol*, merchant, on the 26th *March*, 1807, entered into a charter-party for the voyage in question: that the ship *Friendship* sailed from *Bristol* with a cargo

Knox v.
Wood,
Mich. Sittings
at
Gouldhall,
1808.

cargo for *St. Thomas's*, but which cargo was not the property of the plaintiff, nor insured by this policy: that the ship delivered her cargo at *St. Thomas's*, and proceeded from thence in ballast for *Jamaica*, and was captured before her arrival, and carried into *Cuba*, where she was ransomed by the captain, and again proceeded for, and arrived at *Jamaica*: that the policy in question was meant and intended by the plaintiff as an insurance upon the commissions expected to arise upon the sale and disposition by the plaintiff in *Dublin* of produce expected to be shipped on board the said ship at *Jamaica*. When the counsel for the plaintiff had opened this case, Lord *Ellenborough* said, it is agreed, that this insurance was on the commissions on the homeward cargo; and it is also agreed, that the vessel arrived at the place where that homeward cargo was to be shipped, and no reason is assigned why it was not shipped. No cargo appears to have been ready; this is an insurance of an expectation of an expectation. If courts of justice were to give effect to insurances of this description, they had at once better repeal the statute against wager policies. The plaintiff was nonsuited.

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In the following term a motion was made to set aside this nonsuit, which was refused by the whole court, thus confirming the opinion delivered by Lord *Ellenborough* at *Guildhall*.

In another case also it appeared, that an insurance had been made upon any of the packet-boats that should sail from *Lisbon* to *Falmouth*, or such other port in *England* as his Majesty should direct, for one year, from *October* 1763, to *October* 1764, upon any kinds of goods and merchandizes whatsoever. And it was agreed, that the goods and merchandizes should be valued at the sum insured on such packet-boat, without farther proof of interest than the policy; and to make no return of premium for want of interest being on bullion or goods. The insured had an interest in bullion on board the *Hanover* packet, being one of the king's packets between *Lisbon* and *Falmouth*: and it was totally lost within the time mentioned in the policy.

D1 Costa
v. Firth,
4 Burr.,
1966.

This case has already been quoted for another purpose: but on this point, the court held, that this was a policy of a peculiar sort; and was an exception out of the statute 19 *Geo. 2. c. 37*. It is a mixed policy; partly a wager-policy, partly an open one: and

Vide ante,
p. 167. 212.

C H A P. and it is a valued policy, and fairly so, without fraud or misre-
 XIV. presentation. Therefore the loss having happened, the insured
 is entitled as for a total loss.

It has also been solemnly settled, that upon a joint capture by the army and navy, the officers and crews of the ships, before condemnation, have an insurable interest, by virtue of the prize act, which usually passes at the commencement of a war.

Le Crag v. This was so held in an action upon a policy of insurance on
 Hughes, the ship *St. Domingo*, at and from *Omoa* to *London*; upon which
 B. R. East. a case was reserved for the opinion of the court. The facts of
 22 Geo. III. the case were these: Captain *Luttrell*, commanding five of his
 majesty's ships, and Captain *Dalrymple*, commanding a party of
 the land forces, captured two *Spanish* register ships, lying under
 the protection of Fort *Omoa*: that the ship *St. Domingo* (on
 which the insurance was made) was one of the prizes, and was
 coming home laden with the property then captured; upon which
 ship the defendant underwrote 500*l.*: and that the ship was lost
 by perils of the sea. The question was, whether, by virtue of
 the prize act of the 19 Geo. 3. c. 67. the officers and crews of
 the ships under Captain *Luttrell* had such an insurable interest
 in the *St. Domingo*, as to entitle them to recover?

Lord Mansfield.—“There are two questions in this cause: 1st, Whether the sea-officers had an insurable interest? This will depend on the prize-act and proclamation. 2dly, Whether possession would entitle them to insure, upon the bare contingency of a future grant from the crown? As to the first, consider the act of parliament, which gives to all the people on board, that is, to the flag officers, commanders, and other officers; to the seamen, marines, and soldiers on board every ship and vessel of war, the sole interest and property of and in all and every ship and vessel, goods, and merchandizes, which they shall take during the war, after condemnation. Does the act say, that the seamen only shall take? does it leave a joint capture by the army and navy undefined? Certainly not. Suppose, for instance, a case which I remember to have happened: a *Dutch* and *English* fleet combined captured some ships; the *English* sailors could not take solely; nor could the act mean that they
 should

should have nothing. In the case in question, suppose captain *Dalrymple* had given no assistance, is there any doubt that captain *Luttrell* would have taken the whole? The only difference is, that now he has not the merit of a sole capture. The word "*soldiers*" in the proclamation, means soldiers on board the ship. Thus it stands on the act and proclamation. But supposing that doubtful, as far back as queen *Anne's* time down to the present, wherever a capture has been made by a king's ship or a privateer, the crown has always given a grant of it after condemnation. There is no instance to the contrary. Is then the contingency of the ship's coming safe such an interest as the captor may insure? Insurance is a contract of indemnity; some interest is necessary, but not any particular form of interest: it does not depend on a vested formal interest. The question is, Whether this contingency is such a benefit to the assured, as will make it a loss to him, if the ship does not arrive? An insurance on the profits of a voyage was holden to be good. (*Vide supra*, p. 354) An agent of prizes may insure the arrival of a ship, which will produce him profit; for though he has not the possession of the property, he has such an interest in the ship coming home, as that he may insure. Here the possession is in the assured, and a certain expectation of receiving the property captured from the crown, which gives him an interest in the arrival. It is not a vested interest, but such an expectation as never was defeated. Judgment for the plaintiff (a).

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So in a more modern case it has been held that the captors of ships seized by them as prize have an insurable interest in them, in the voyage home for the purpose of bringing them to adjudication in the Admiralty; so that although the court of Admiralty should ultimately adjudge them to be no prize, and award restitution to the original owners, the captors are not entitled to a return of premium. The point came before the court upon a case reserved at the trial.

Boehm v.
Bell, 81 *erm*
Rep. 154.

Lord *Kenyon*, after argument, observed, "that if it were a legal capture, the captors were entitled; if the capture were

(a) Since the former editions of this Book, I have had an opportunity of comparing my own note of the above case with that of another gentleman at the Bar; and have thereby been enabled to give a fuller account of Lord Mansfield's argument.

C H A P. improperly made, they were liable to be called to account in the
 XIV. court of Admiralty, where they might be amerced in damages
 and costs. They had therefore a right to insure themselves
 against the decision, that might have loaded them with damages
 and costs. On this short ground I am of opinion that the assured
 had an insurable interest, that the risk was begun, and that there
 can be no return of premium."

Mr. Justice *Grose*.—"The whole difficulty has arisen from
 confounding an absolute indefeasible interest with an insurable
 interest. It is not pretended that the assured had the absolute
 property in the subject of insurance; neither need they have such
 property to make the policy legal; it is sufficient if they had an
 insurable interest: and according to what was said by Lord
Mansfield in *Le Cras v. Hughes* they certainly had an insurable
 interest. If they had succeeded in the Court of Admiralty, it
 will be admitted that they had an insurable interest; and in case
 of their not succeeding there, there were events in which they
 might be made answerable, and against which it was competent
 to them to insure."

Mr. Justice *Lawrence*.—"The case turns on this short ques-
 tion, Whether or not the assured had an interest which they
 might insure? Did they mean to game? or was there not a loss
 against which they might indemnify themselves by a policy? I
 do not mean a certain but a possible loss. Now it has been
 shewn that this was a case in which the Admiralty might have
 decreed costs and damages, and that is sufficient. It might be
 asked in the language of Lord *Mansfield* in *Le Cras v. Hughes*,
 Had not the insured such an interest in the ship coming home, as
 to entitle them to an indemnity? I think they had, and there-
 fore the plaintiffs are not entitled to a return of premium."

Crauford
v. Hunter,
 8 Term Rep.
 113. See
ante, p. 352.
 for another
 point.
Crauford v.
Lucena,
 3 B. & P. 75.
 in the Exch.
 Ch. and

So also the commissioners appointed by the act of the 35 Geo. 3.
 c. 80. for the purpose of taking care and disposing of Dutch
 ships and effects detained in or brought into the ports of this
 kingdom, and who by their commission are to manage, sell, and
 dispose of the same to the best advantage, according to the in-
 structions they should from time to time receive from his ma-
 jesty and the privy council, have an insurable interest in Dutch
 ships and effects seized at sea by his majesty's ships of war; that
 they

they might be brought into the ports of this kingdom; they may insure in their own name, and a count in a declaration on such a policy, stating the nature of their trust, and averring that they *as such commissioners* were interested in the said ships and goods, and that the said insurance was made to and for their use, benefit, and account, as such commissioners, was, upon demurrer, holden to be good, the Court considering them in the light of trustees, consignees, or agents, in either of which characters it was conceived they had an insurable interest.

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2 New Rep.
269 in the
House of
Lords.

These causes continued to agitate *Westminster Hall* for a great number of years; and the arguments have run into considerable length, all of which, both as used at the bar and by the learned judges, are fully reported in 3 *Bos. & Puller*, 75. and by the same gentlemen in 2 *New Rep.* from p. 269 to 329. I need hardly say, when the high character of the *British* bench is considered, that these arguments contain a great mass of erudition on the subject of insurable interest. I find it quite impossible to give those arguments in this place, without swelling my work to a size which would far exceed its original design. Besides, as the *Dutch* commission is now at an end, the precise questions agitated in these causes never can arise again. I shall therefore content myself with stating the history and the event of the suits, referring the practitioner and the diligent student to the reporters.

The case was three times argued in the Exchequer Chamber, and the judgment of the Court of King's Bench was affirmed by Lord *Alvanley*, Chief Justice of the Common Pleas, Lord Chief Baron *McDonald*, *Heath* and *Rooke*, Justices; *Hutbam*, *Thompson* and *Graham*, Barons, against the opinion of Mr. Justice *Chambre* *Hil. T. 1802.* 3 *Bos. & Pull.* 75. A writ of error was afterwards brought upon this judgment in the House of Lords; and after much argument at the bar, several questions were referred to the learned judges, a majority of whom were for affirming the judgment of the Exchequer Chamber. But some doubts having arisen in the House of Lords, as to the extent of the damages which had been given, particularly by the then Lord Chancellor (*Erykine*), and by Lords *Eldon* and *Ellenborough*, a *venire facias de novo* was awarded in *July 1806*, which came on

C H A P. to be tried before Lord *Ellenborough* at the sittings after *Michaelmas* 1806. In the course of the discussion, which had taken place, it was pretty generally understood, that whatever differences of opinion there might be respecting the interest of the *Dutch* commissioners, the House of Lords, and all the judges were clearly of opinion, that his majesty had undoubtedly an insurable interest in the ships and cargoes taken possession of under the authority of the above-mentioned statute, therefore the Attorney General (*Gibbs*), and myself, who were of counsel for the plaintiffs, thought it our duty, under these circumstances, to take verdicts on those counts, which averred the interest to be in the King. Lord *Ellenborough* also directed the jury that in his opinion, his majesty had a good insurable interest: upon which direction the underwriters, by their counsel, tendered his Lordship a bill of exceptions. The parties agreed to carry the writ of error to the House of Lords at once, without going through the Court of Exchequer Chamber; and at last, on the 29th *June* 1808, the House unanimously, with the concurrence of all the judges, gave judgment for the assured, affirming the judgment of the King's Bench.

Mill and another v. Secretary of the Board of Customs, 1 Bos. & Pull. 315.

In a case in the Court of Common Pleas, where a house in *Spain*, who were indebted to the plaintiffs, had consigned goods to Messrs. *Dutois*, and indorsed the bill of lading to them, with a letter annexed, directing them to hold a part of the said cargo for the use of the plaintiffs, who upon getting such intelligence made the insurance in question, although they had given no orders for the goods, the Court held that the plaintiffs, being creditors of the house in *Spain*, raised a good consideration for the assignment; and that therefore there could be no doubt that the plaintiffs had a good insurable interest.

See Anderson v. Edie, 1 Bos. & Pull. 302.

Wolfe and another v. Hornecastle, 1 Bos. & Pull. 316.

So also in the same court, it was held that where a man had consigned a cargo to the Cudbear Company in *London*, and drawn bills for the amount, but transmitted the bills of lading through the plaintiffs, his general agents, to be sent to the Cudbear Company that they might insure, and he at the same time drew on plaintiffs for 300*l.* which was accepted and paid: but the Cudbear Company refused to accept the bills drawn on them, or take to the cargo, or to insure, upon which the plaintiffs made insurance

insurance in their own name, and informed the consignee, who approved thereof; the plaintiffs were to be considered as consignees of the whole, and had a right in that character to insure for the benefit of their consignee; and that they had a clear insurable interest in themselves to the amount of 300*l*.

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But still in the construction of the act it has always been holden, that all insurances made by persons having no interest in the event, about which they insure, or without reference to any property on board, are merely wagers, destructive of the true ends for which this contract was introduced into the mercantile world; and therefore are to be considered as absolutely null and void.

See ante,
Knox v.
Wood.

Upon a motion for a new trial, Lord *Mansfield*, who had tried the cause, made the following report: This was an action brought by the plaintiff, who was a surgeon on board an *East Indiaman*, against the defendant, a passenger in the same ship, to recover a sum of 1000*l*. upon a special agreement, bearing date the 18th of *July* 1774; by which, after reciting, that "whereas" the plaintiff had agreed to pay to the defendant the sum of "20*l*. sterling at the next port the ship should arrive at, it was" witnessed that he the defendant, in consideration thereof, did "undertake that the said ship should save her passage to *China*" that season: and in case she did not, that then he would pay "to the plaintiff the sum of 1000*l*. at the end of one month" after the arrival of the said ship in the river *Thames*." At the trial it appeared, that the plaintiff duly paid the amount of the 20*l*. to the defendant at the next port, in pagodas: that the vessel being delayed below the Cape and *Madras* in consequence of a miscalculation of five days in the reckoning, and the monsoons setting in earlier than usual, she lost her passage. That the plaintiff had some goods on board, which were liable to suffer by the loss of the season; and that whilst it was still doubtful whether the ship would or would not save her passage, the captain had applied to each of the parties, to persuade them to rescind the agreement; representing that the sum to be paid in either event would be more than the loser could afford. That the plaintiff was willing to have cancelled the agreement; but the defendant positively refused. The jury found a verdict for the plaintiff, damages 980*l*., but I gave the defendant leave to

Kent v.
Bird, Cowp.
583.

C H A P. XIV. move for a new trial upon the question, Whether this were not an agreement within the statute 19 *Geo. 2. c. 37.* and therefore void ?

After this case had been fully argued at the bar,

Lord *Mansfield* said.—“ A policy of insurance is in the nature of it, a contract of indemnity, and of great benefit to trades. But the use of it was perverted by its being turned into a wager. To remedy this evil, the statute of the 19 *Geo. 2. c. 37.* was made; which, after enumerating in the preamble the various frauds and pernicious practices introduced by the perversion of this species of contract; and amongst others, that of gaming or wagering under pretence of insuring vessels, &c. proceeds under general words, to prohibit *all* contracts of insurance by way of *gaming* or *wagering*. Here the plaintiff gives so much to the defendant in consideration that the ship should save her passage to *China*; and if not, then, upon her returning safe to *England*, he is to receive 1000*l.* If the first of these events happened, the defendant won; but he could not lose, unless both happened. Is not this gaming? Is not this wagering? If this were allowed, all wagering policies would be turned into this form, and the act would be entirely defeated. If there is no interest in the case, it is gaming and wagering. Therefore there must be a new trial.”

From this case we find, that the principle stated by Lord *Mansfield* in *Lewis v. Rucker* is confirmed: namely, that where a man insures 2000*l.* and it turns out in proof that he has an interest to the value of a cable only, such an interest will never be allowed to operate so as to evade the statute. For in this case, it appeared in evidence, that the plaintiff had *some goods* on board; but that was held not to be an interest sufficient to justify an insurance so evidently contrary to the act of parliament.

Indeed wherever the Court can see upon the face of the policy, that it is merely a contract of gaming, where indemnity is not the object in view, they are bound to declare such policy void.

The

The plaintiffs had lent to *Lawson*, captain of the *Lord Holland* C H A P.
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East Indiaman 26,000*l.* for which he had given them a common bond, in the penal sum of 52,000*l.* While he was with his ship at *China*, the plaintiffs got a policy of insurance underwritten by the defendant and others, which was in the following terms: "At and from *China* to *London*, beginning the adventure upon the goods from the loading thereof on board the said ship at *Canton*, in *China*, &c. and upon the said ship from and immediately following her arrival at *Canton* in *China*, valued at 26,000*l.* being the amount of captain *Patrick Lawson's* common bond, payable to the parties, as shall be described at the back of this policy; and it bears date the 16th day of *December* 1775; and in case of loss, *no other proof of interest to be required than the exhibition of the said bond*: warranted free from average, and without benefit of salvage to the insurer."

Lowry and
another v.
Douglass. 468.

At the head of the subscription was written, "On a bond as above expressed." Captain *Lawson* sailed from *China*, and arrived safe with his privilege (as it is called) or adventure, in *London*, on 1st of *July* 1777, none of the events insured against having happened. The receipt of the premium was acknowledged on the back of the policy. This case came before the court upon an action for a return of premium, on the ground that, the policy being without interest, the contract was void. This case, as far as it relates to the question of return of premium, will be considered in a future chapter; but in the course of the discussion, it became necessary to determine, whether the policy just recited was good within the statute. At the trial which came on at the sittings after *Trinity* term 1780, the Chief Justice was of opinion, that this was a gaming policy prohibited by the statute of 19 *Geo. 2. c. 37.* and a verdict was given for the defendant. His lordship, however, having expressed a doubt upon the propriety of his opinion on other points of the cause, a motion for a new trial was afterwards made, and all the questions came to be debated before the court: when the majority of the judges confirmed Lord *Mansfield's* first direction upon all the points. It is true Mr. Justice *Willes* differed from his brethren upon that occasion; the learned judge being of opinion, upon the question relating to our present inquiry, that this was not a gaming policy;

C H A P. policy: that it did not appear to him, that the parties had any
 XIV. idea they were entering into an illegal contract: that the whole
 was disclosed, and they *thought* there was an interest; this was
 a mistake; but it is a new point of law.

The three other judges supported their opinions upon the following grounds.

Lord *Mansfield*.—"It is certainly true, in many instances, that first thoughts are best. I am now very much inclined to my first opinion. There are two sorts of policies of insurance; mercantile and gaming policies. The first sort are contracts of indemnity, and of indemnity only; and from that principle a great variety of decisions and consequences have followed. The second sort may be the same in form; but in them there is no contract of indemnity, because there is no interest upon which a loss can accrue. They are mere games of hazard, like the cast of a die. In the present case the nature of the insurance is known to both parties. The plaintiffs say, "We mean to game: but we give our reason for it; Captain *Lawson* owes us a sum of money, and we want to be secure in case he should not be in a situation to pay us." It was a hedge. But they had no interest; for if the ship had been lost, and the underwriters had paid, still the plaintiffs would have been entitled to recover the amount of the bond from *Lawson*. This then is a gaming policy; and against an act of parliament."

Mr. Justice *Ashburst*.—"A policy of insurance ought to be a mere contract of indemnity, and nothing more; but here the money might have been paid twice, which shews decisively that this was a gaming policy."

Mr. Justice *Buller*.—"It is very clear to me that the plaintiffs ought not to recover. There was no fraud on the part of the underwriters, nor any mistake in matter of fact. If the law was mistaken, the rule applies, that *ignorantia juris non excusat*. This was a mere gaming policy without interest." Agreeably to this opinion, the rule for a new trial was discharged.

The second section of the act in question, which allows of insurances being made on private ships of war, interest or no interest, seems sufficiently clear, and requires no explanation.

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The third section, by which insurances upon any merchandizes or effects from any ports or places in *Europe* or *America*, in the possession of the crowns of *Spain* or *Portugal* may be effected in the manner practised before this act was passed, seems to be obscurely worded. The learned commentator upon the law of *England* observes, that the reason of this proviso is sufficiently obvious. Notwithstanding this authority, in order to comprehend the meaning of the legislature, we must observe, that the trade from *Spain* and *Portugal*, to their respective colonies and establishments in *South America*, and the returns thereof, can only be carried on by their own subjects; and all other persons are prohibited from that trade by positive regulations of these respective states. The consequence of such a prohibition is, that all the goods and merchandizes which the subjects of this and other countries export from *Spain* and *Portugal*, must be in the names of *Spanish* subjects. So that it was absolutely necessary to make this exception, (for no other proof but the policy itself can be brought); otherwise all insurances upon that branch of trade must have been entirely void. The words, however, seem to allow a greater latitude than was meant by the legislature in making such a provision, for by adverting merely to the words, insurances from any ports or places in *Europe* or *America*, belonging to *Spain* and *Portugal*, to *England* or other ports of *Europe* may be made, as if this act had never passed. Whereas by attending to the prohibition of trade just mentioned to any but the subjects of *Spain* and *Portugal*, as the commerce between these colonies and the parent countries can only be carried on by subjects, it is evident that the legislature intended rather to have said, that insurances on goods from ports belonging to *Spain* and *Portugal* in *Europe* to any ports in *America* belonging to those courts; and from such ports in *America* to such ports or places in *Europe*, shall be valid and effectual contracts, than to authorize insurances from the dominions of *Spain* and *Portugal* in *Europe* or *America*, to whatsoever place in the world the ship, in which these goods are to be carried, may happen to be destined. The words, however, certainly admit of that

Mr. Justice
Blackstone,
2 Vol. Com.
460.

CHAP. broad construction: for the place of destination is not ascertained.
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Upon this section of the act, it may be observed, that the equitable construction of such contracts of insurance as are protected by it, seems to be, that they may be made without interest, notwithstanding the case of *Goddart v. Garrett*, above cited: since in such instances it is impossible for the person insured to bring any certain proof of interest on board.

Vide ante,
p. 345.

Hitherto we have spoken merely of that part of this very salutary act, which requires, that every person making such a contract, should have an interest in that, which is the object of the insurance. Another part of it still claims our attention, that which prohibits re-assurances. What a re-assurance is; in what cases it is prohibited; and when it is allowable, will form the subject of the following chapter.

CHAPTER THE FIFTEENTH.

Of Re-Assurance, and Double Insurance.

RE-ASSURANCE, as understood by the law of *England*, C H A P. XV.
 may be said to be a contract, which the first insurer enters into, in order to relieve himself from those risks which he has incautiously undertaken, by throwing them upon other underwriters, who are called re-assurers. This species of contract has obtained a place in most of the commercial systems of the trading powers of *Europe*; and it is allowed by them at this day to be politic and legal. The learned *Roccus* has decided expressly in favour of it; and has cited many respectable authorities in support of his opinion. “Affecurator, post factam affecurationem, potest se affecurari facere ab alio affecutore, et iste secundus affecurator tenetur pro affecuratione facta a primo, et ad solvendum omne totum, quod primus affecurator solverit, et ista secunda affecuratio valet.” By the ancient law of *France* such assurances were reckoned valid, and perfectly consistent with equity and good conscience. The author of the *Guidon* observes, that if it so happen that the insurers, after underwriting the policy, repent of their engagement, or are afraid to encounter the risk, they are at liberty to re-insure; but still they cannot prevent the insured from making his demand upon them in case of loss, for having, by their signature, promised indemnity, they cannot, by any protestations to the contrary, discharge themselves from their responsibility, without the consent of the insured. *Lewis* the Fourteenth, when, by the assistance of the famous *Colbert*, he promulgated those ordinances, which will be a lasting honour to the *French* nation, adopted the idea that prevailed when the *Guidon* was written: for by an article in that celebrated code of laws, he expressly declared, “that it should be lawful to the insurers to make re-assurance with other men of those effects, which they had themselves previously insured.” It is not in *France* alone that this law prevails; for by the positive and express regulations and ordinances of *Koninberg*, *Humburgh*, Roccus de Affecur. not. 12.
Le Guidon, c. 2. art. 19.
Ord. Lewis 14. tit. Assurance, art. 20.
2 Mag. 190.
233. 419.

C H A P. *Hamburg*, and *Bilboa*, re-assurances are allowed to be effected,
 XV. and consequently are lawful contracts.

By the passage cited from the Guidon it might be observed, that it was a distinguishing character of this species of contract, that notwithstanding a re-insurance, the first contract subsists as at first, without change or amendment. The re-insurer is
 Emerigon, wholly unconnected with the original owner of the property insured; and as there was no obligation between them originally, so none is raised by the subsequent act of the first underwriter. The risks of the insurer form the object of the re-insurance, which is a new independent contract, not at all concerning the insured; who consequently can exercise no power or authority with respect to it.

Emerigon,
 Pt. 247.

Pothier, tit.
 Assurance,
 No. 96.

Agreeably to the laws of those countries just referred to, and consistently with the opinions of those respectable writers, whose works we have had such frequent occasion to mention, the law of *England* adopted their regulations, and permitted the underwriters upon policies to insure themselves against those risks for which they had inadvertently engaged to indemnify the insured: or where perhaps they had involved themselves to a greater amount, than their ability would enable them to discharge. Although such a contract seems perfectly fair and reasonable in itself, and might be productive of very beneficial consequences to those concerned in this important branch of trade; yet, like many other useful institutions, it was so much abused, and turned to purposes so pernicious to a commercial nation, and so destructive of those very benefits it was originally intended to promote and encourage, that the legislature was at last obliged to interpose, and by a positive law to cut off all opportunity of practising those frauds in future, which were become thus glaring and enormous.

19 Geo. II.
 c. 37. §. 4.

Accordingly by the fourth section of that statute, which formed the subject of the preceding chapter, it was enacted,
 “ that it should not be lawful to make RE-ASSURANCE, unless
 “ the assurer should be insolvent, become a bankrupt, or die; in
 “ either of which cases, such assurer, his executors, administrators, or assigns, might make re-assurance, to the amount
 “ before

“ before by him assured, provided it should be expressed in the policy to be a re-assurance. CHAP. XV.

From this act it is apparent that all kinds of re-assurance are not prohibited; but wherever such a contract tends to the advancement of commerce, or to the real benefit of an individual, in such a case it shall be permitted. Thus in case of insolvency or bankruptcy, it is advantageous to the creditors in general, as well as to the individual, that a re-assurance should be made; for by these means the fund of the bankrupt's estate is not diminished in case of loss, and the insured has a better security for the payment of the amount of his damage, or at least a proportion of it (a). If the insurer die, it is no less necessary and beneficial to his successors, that there should be a re-assurance, than it was in the former case of a bankruptcy: because it will provide assets to satisfy the insured in case a loss should happen.

(c) Formerly, if an underwriter became a bankrupt after he had subscribed the policy, and before a loss happened, the insured was not entitled to a dividend out of the bankrupt's estate. This being found a heavy inconvenience, and a discouragement to trade, parliament was obliged to interpose, and to alter the law in this respect. The statute recited, “ that merchants and traders frequently lend money on bottomry, or at *respondentia*, and in the course of their trade, frequently cause their ships or vessels, and the goods and merchandizes loaded thereon, to be insured; and that where commissions of bankruptcy have issued against the obligor in such bottomry or *respondentia* bond, or the underwriter, or assurer in such insurance, before the loss of the ship or goods, in such bond or policy of insurance mentioned, had happened, it had been made a question, Whether the obligee or obligees in such bond, or the assured in such policy of insurance, should be let in to prove their debts, or be admitted to have any benefit or dividend under such commission? which might be a discouragement to trade.” It was therefore enacted, “ that the obligee in any bottomry, or *respondentia* bond, and the assured in any policy of insurance, made and entered into, upon a good and valuable consideration, *bona fide*, should be admitted to claim; and after the loss or contingency should have happened, to prove his, her, or their debt and demands, in respect of such bond or policy of insurance, in like manner as if the loss or contingency had happened before the time of the issuing of such commission of bankruptcy against such obligor or insurer; and should be entitled unto, and should have and receive, a proportionable part, share and dividend of such bankrupt's estate in proportion to the other creditors of such bankrupt, in like manner, as if such loss or contingency had happened before such commission issued: and that all and every person and persons against whom any commission of bankruptcy should be awarded, should be discharged of and from the debt or debts, owing by him, her, or them, on every such bond and policy of insurance as aforesaid, and should have the benefit of the several statutes now in force against bankrupts in like manner, to all intents and purposes, as if such loss or contingency had happened, and the money due in respect thereof had become payable before the time of the issuing out the commission.”

and

C H A P. XV. and thus secure the estate of the deceased for the benefit of his heirs. Indeed, in both cases, the intention of the legislature seems to have been, to provide a fund for the payment of that proportion, which, in case of an insolvency, the insured will have a right to demand, in common with the other creditors; and for the payment of the whole, without prejudice to the heir, even in cases where the ancestor, at the time of his death, was in solvent circumstances.

Vide ante,
c. 14.

This act is worded in such express terms, excluding every species of re-assurance, except in the three instances of death, bankruptcy, or insolvency, that a doubt, as it should seem, could hardly be founded upon it. But as it was held, that the first clause of the statute, prohibiting insurances, *interest or no interest*, did not extend to foreign ships; so it was argued, that re-assurances made here on *the ships of foreigners* did not fall within the act. It might have occurred, however, that the first clause of the statute is qualified, and only prohibits such insurances when made *on his majesty's ships, or the ships belonging to his Majesty's subjects*: whereas the clause in question is general and without restriction; the inference from which is, that the legislature had both objects in view, and meant wholly to prohibit the one, but not the other.

Andree v.
Fletcher,
2 Term
Rep. 161.

This point came on to be considered by the court of King's Bench, in the year 1787, in the form of a special case, stating, that a re-assurance was made by the defendant on a *French vessel*, first insured by a *French underwriter at Marseilles*, who was living, and who, at the time of subscribing the second policy, was solvent.

The court (*Asbburgh, Buller, and Grose, justices*,) were unanimously of opinion, that this policy of re-assurance was void: and that every re-assurance in this country, either by *British* subjects or foreigners, on *British* or foreign ships, is void by the statute; *unless the first assurer be insolvent, become a bankrupt, or die.*

Le Guidon, *
c. 2. s. 1. 20.

There is another species of re-assurance allowed by the laws of *France*, as established by an ordinance of *Louis the Fourteenth*, which was also taken from that ancient and excellent *French*

French treatise, that has been so frequently mentioned. By this regulation, it is declared lawful for the assured to insure the solvency of the underwriter. By these means, the person insured gets rid of those fears, which he may have conceived concerning the ability of the insurers to pay, and he gains a second security to answer for the sufficiency of the first. But it is not to *France* alone that this kind of contract is restrained; for by the positive laws of many other maritime states, such re-assurances are valid and binding contracts. The *English* statute, which has been the subject of this and the preceding chapter, takes no express notice of this sort of insurance; because, in truth, I believe, it never was very much in practice in *England*: but, however, it seems clear, that such a circumstance, as the solvency of the underwriter, is not an insurable interest; that a policy opened upon such an event would be treated as a wager-policy; and would consequently fall within the statute of *George* the Second, which declares all policies made by way of gaming or wagering, to be absolutely null and void to all intents and purposes.

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Ord. of Lew.
14. tit. Af-
surance,
art. 20.

2 Mag. 190.
419.

Having said thus much of re-assurances, I shall proceed to consider the nature of a double insurance, and to state the few cases that have been determined upon the subject. I treat of it in this place, because these two kinds of insurance have been sometimes confounded together, and supposed to mean the same thing: whereas no two ideas can be more distinct. We have already seen what is meant by a re-assurance. A double insurance is where the same man is to receive two sums instead of one, or the same sum twice over, for the same loss, by reason of his having made two insurances upon the same goods or the same ship. The first distinction between these two contracts is, that a re-assurance is a contract made by the first underwriter, his executors or assigns, to secure himself, or his estate: a double insurance is entered into by the insured. A re-assurance, except in the cases provided for by the statute, is absolutely void: a double insurance is not void; but still the insured shall recover only one satisfaction for his loss. This requires explanation. Where a man has made a double insurance, he may recover his loss, against which of the underwriters he pleases, but he can recover for no more than the amount of his loss. This depends upon the nature of an insurance, and the great principles of justice and good faith. An insurance is merely a contract of indemnity

Double In-
surance.

1 Bur. 496.

19 Geo. II.
c. 37. s. 4.
1 Black.
Rep. 416.

1 Bur. 492.

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indemnity in case of loss: it follows as a necessary consequence that a man shall not recover more than he has lost, or recover satisfaction greater than the injury he has sustained. This rule was wisely established, in order to prevent fraud, lest the desire of gain should occasion unfair and wilful losses. It being thus settled, that the insured shall recover but one satisfaction, and that in case of a double insurance, he may fix upon which of the underwriters he will for the payment of his loss, it is a principle of natural justice that the several insurers should all of them contribute in their several proportions, to satisfy that loss, against which they have all insured.

These principles have been fully declared to be law in several cases, which are now to be mentioned.

Newby v.
Reed, Sitt.
in London
in Easter
Vac. 1763.
2 Blac. Rep.
416.

In the year 1763, it was ruled by Lord *Mansfield*, Chief Justice, and agreed to be the course of practice, that upon a double insurance, though the insured is not entitled to two satisfactions; yet, upon the first action, he may recover the whole sum insured, and may leave the defendant therein, to recover a rateable satisfaction from the other insurers.

Rogers v.
Davis, Sitt.
in Mich.
Vac. 17
Geo. III.
before Lord
Mansfield.

Thus also it was determined in a subsequent case at *Guildhall*. It was an action on a policy of insurance on a ship from *Newfoundland* to *Dominica*, and from thence to the port of discharge in the *West Indies*. It was a valued policy on the ship and freight; and on the goods as interest should appear. The ship sailed from *St. John's* the 17th of *December* 1775, and the plaintiff declared as for a total loss. The defendant underwrote for 200*l.* and has paid into court 124*l.* This sum was paid on a supposition, that the underwriters on a former policy should bear a share of the loss. The plaintiff had originally insured at *Liverpool* on a voyage from *Newfoundland* to *Barbadoes* and the *Leeward Islands*, with an exception of *American* captures: but the plaintiff afterwards, for the purpose of securing himself against captures, and having altered the course of his voyage, made the present insurance. The plaintiff now insisted he was intitled to receive the full amount of his insurance against the defendant, and not to any part from the *Liverpool* underwriters, because the voyage now insured was different from that insured at *Liverpool*. There was however a verdict for the plaintiff for

his full demand, *with liberty for the defendant to bring an action against the Liverpool underwriters, if he thought fit.* C H A P. XV.

Accordingly in the *Easter* term following, an action was brought for money had and received to the use of the plaintiff, who was the defendant in the last clause, in order to recover a contribution for the loss which the plaintiff had been obliged to pay. It was agreed by both parties to admit, that on the *London* policy (which was the subject of the former action), 2200*l.* were insured: that on the two *Liverpool* policies 1700*l.* were insured: that the merchant was interested to the amount of 500*l.* on the ship; 300*l.* on the freight; and 1400*l.* on the cargo, that the plaintiff had paid 200*l.* loss, and 47*l.* for the costs. The question was, whether the defendant was liable to contribute any thing, and what. The whole interest was 2200*l.* and the whole insurance was 3900*l.* It was insisted by the counsel for the defendant, that the insurance in *London* was an illegal re-assurance; and therefore the plaintiff might have made a good defence in an action brought against him: and if so, he could not now recover over against the defendant.

Davis v.
Gildart,
Sittings in
East. Vac.
17 Geo. III.
at Guild-
hall.

Lord *Mansfield*.—"The question seems to be, whether the insured has not two securities for the loss that has happened. If so, can there be a doubt that he may bring his action against either? It is like the case of two securities; where, if all the money be recovered against one of them, he may recover a proportion from the other. Then this would bring it to the question, whether the second insurance is void as a *re-assurance*. But a re-assurance is a contract made by the insurer to secure himself; and this is only a double insurance." There was another ground taken in the cause, which is not material to be mentioned here: but upon this direction, the plaintiff had a verdict.

Although a man, by making a double insurance, shall not be allowed to recover a double satisfaction for the same loss; yet various persons may insure various interests on the same thing, and each to the whole value (as the masters for wages; the owner for freight; one person for goods, another for bottomry), and such a contract does not fall within the idea of a double insurance. There is a full case upon this subject, and a very elaborate argument of Lord *Mansfield*, in delivering the judgment of

1 Bur. 496.

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Godin and
others v.
The Lon-
don Assu-
Comp.
2 Burr. 489.
1 Mac.
Rep. 103.

of the whole court of King's Bench, in which most of the questions relative to double insurances are clearly and decisively settled. In this cause the question was, Whether the plaintiff ought to recover his whole loss, or only a half? it being objected that there was a double insurance. A verdict was found for the whole, subject to the opinion of the court upon Lord Mansfield's report.

Lord Mansfield, in delivering the opinion of the court, began, by stating the facts, as they appeared to him at the trial.

Mr. *Meybohm* of *St. Petersburg* had dealings with Mr. *Amyand* and Company of *London*, who often sent ships from *London* to Mr. *Meybohm* at *St. Petersburg*. *Meybohm*, as appeared by the evidence, was indebted, on the balance of their accounts, to *Amyand* and Company. *Amyand* and Company sent a ship, called *The Galloway*, *Stephen Barker* master, to Mr. *Meybohm*, at *St. Petersburg*, to fetch certain goods. *Meybohm* sent the goods, and promised to send the bill of lading by the next post, but never did. Afterwards, in *August* 1756, *Amyand* and Company got a policy of insurance from private underwriters, for 1100*l.* on the ship, tackle, and goods, at and from *London* to *St. Petersburg*, and at and from thence back again to *London*: which policy was signed by several private underwriters, quite different persons from the present defendants; and of this sum of 1100*l.* thus underwritten, 500*l.* was declared to be on $\frac{1}{6}$ parts of the ship, and the remaining 600*l.* to be on goods. Between the 26th of *August* and the 28th of *September* 1756 (both included), Mr. *Amyand* insured 800*l.* more, with other private insurers: and this latter insurance was upon goods only: and was only at and from *St. Petersburg* to *London*. On the 28th, 29th, and 30th of *October* 1756, Mr. *Amyand* insured 900*l.* more with other private insurers, which last insurance was on goods only, at and from the *Sound* to *London*. So that the whole sum insured by *Amyand* and Company was 2800*l.* of which the sum of 2300*l.* was on goods, and the remaining 500*l.* was on the ship. Several letters being given in evidence, it appeared that *Meybohm* wrote from *Peterburg* on the 7th of *September* 1756 (the date of his first letter on this subject) to *Amyand* and Company; and mentioned what goods he should send to them, referring to the invoice for particulars; and directed them to get insurance there-

on, and to place the goods and the insurance to a particular account which he named in his letter; in which he also specified some iron, which was for Mr. *Amyand's* own account. This letter Mr. *Amyand* afterwards received (probably about the 27th of *October*,) and in consequence of it made the insurance accordingly, upon the 28th, 29th, and 30th of the same *October*, as before-mentioned. *Meybohm*, having shipped the goods, indorsed the bills of lading to one Mr. *John Tamefz* in *Moscow* (the plaintiff, in effect, in the present action) who, on the 7th of *October* 1756, wrote to his correspondent Mr. *Uthhoff* here in *London* to insure these goods. In this letter he desires Mr. *Uthhoff* to insure the *whole*, that he (*Tamefz*) might be safe in all events; for he suspected that these goods were intended to be consigned by *Meybohm* to somebody else, and perhaps might be insured by some other persons. And he says they were transferred to him, in consideration of his being in advance to *Meybohm* more than their amount. This letter from Mr. *Tamefz*, with these directions to insure, was received by Mr. *Uthhoff*, on the 15th of *November* 1756. Mr. *Uthhoff* accordingly applied to the defendants, the *London Assurance Company*; and disclosed to them, at the same time, all these particulars: and they, upon the 16th of *November* 1756, after being thus apprised, that there might be another insurance, made the insurance now in question, for 2316*l.* on the goods at and from the *Sound* to *London*. The goods were lost in the voyage. Mr. *Uthhoff's* insurance was made by the plaintiffs *Godin, Guyon, and Company*, who are insurance brokers: and they declare that this insurance was made by order of *Henry Uthhoff* esq. This declaration is indorsed upon the policy, and is dated the 18th of *November* 1756. There is no doubt as to the value of the goods, or as to the loss of them. It is admitted by the defendants, that the plaintiffs ought to recover half the loss from them: but they say they ought to pay only half, not the *whole* of the loss. So that the only question is, whether the plaintiffs are entitled, upon the circumstances of this case, and upon the facts I have been stating, to recover the *whole* loss from the present defendants; or only the *half* of his loss from *them*, and the remainder from the underwriters of Mr. *Amyand's* policy. The verdict is found for the plaintiff, for the *whole*: but it is agreed to be subject to the opinion of this court, upon the question I have just mentioned.

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First, to consider it as between the insurer and insured. As between them, and upon the foot of commutative justice merely, there is no colour why the insurers should not pay the insured the whole: for they have received a premium for the whole risk. Before the introduction of wagering policies, it was upon principles of convenience very wisely established, that a man should not recover more than he had lost. Insurance was considered as an indemnity only, in case of a loss; and therefore the insurance ought not to exceed the loss. This rule was calculated to prevent fraud; lest the temptation of gain should occasion unfair and wilful losses. If the insured is to receive but one satisfaction, natural justice says that the several insurers shall all of them contribute *pro rata*, to satisfy that loss, against which they have all insured. No particular cases are to be found on this head: or, at least, none have been cited by the counsel on either side. Where a man makes a double insurance of the same thing, in such a manner that he can clearly recover against several insurers in distinct policies a double satisfaction, the law certainly says that he ought not to recover doubly for the same loss, but be content with one single satisfaction for it. And if the same man really and for his own proper account insures the same goods doubly, though both insurances be not made in his own name, but one or both of them in the name of another person, yet that is just the same thing; for the same person is to have the benefit of both policies. And if the whole should be recovered from one, he ought to stand in the place of the insured, to receive contribution from the other, who was equally liable to pay the whole. But in this case if *Tamez* was not to have the benefit of both policies in all events, then it can never be considered as a double policy.

It has been said, that the indorsement of the bills of lading transferred *Meybohm's* interest in all policies, by which the cargo assigned was insured; and therefore *Tamez* has a right to Mr. *Amyand's* policy; and that *Tamez*, being the assignee of *Meybohm*, is the *cestui que trust* of it, and may recover the money insured; and even that he may bring trover, or detinue, for the very policy itself: and it is urged from hence, that he either will or may have a double satisfaction for the same loss.

But allowing that by the indorsement of the bills of lading and assigning the cargo to *Tamefs*, he stands in the place of *Meybohm* in respect of his insurances; yet Mr. *Amyand* has an interest of his own, and had actually insured the ship and goods, to the amount of 1900*l.* (upon both together) prior to any directions or intimation received from Mr. *Meybohm*, to insure for him. Various people may insure various interests on the same bottom: (as one person for goods, another for bottomry, &c.) And here Mr. *Amyand* had an interest of his own, distinct from that of Mr. *Meybohm*: he had a lien upon these very goods as a factor to whom a balance was due. And he had the sole interest in the ship; which was a part of the things insured by him. It is far from appearing, that even his last insurance (in *October*) was made on the account of *Meybohm*, or as agent for him. So far from it, Mr. *Amyand* insists upon it for his own benefit (as he expressly declared at the trial), and absolutely refuses to give it up, or to suffer his name to be used by the plaintiff; though he was a witness for the defendants, and was produced by them, and inclined to serve them. So that the foundation of this argument, urged by the defendant's counsel, fails them; and there is, in reality, nothing to support it. But even supposing that Mr. *Amyand* had made his insurance, not upon his own account, but as agent or factor for Mr. *Meybohm*, and upon the account of *Meybohm*; yet even then *Tamefs* can never come against *Amyand*'s underwriters, or come at *Amyand*'s policy to his own use. For *Amyand*, the factor of *Meybohm*, has possession of the policy, and appears to have been a creditor of *Meybohm* upon the balance of accounts between them, at the time when he made the insurance: and I take it to be now a settled point, "that a factor to whom a balance is due, has a lien upon all goods of his principal, so long as they remain in his possession." *Kruger and others v. Wilcox and others*, was a case in Chancery upon this point. It came on first before Sir John Strange, then Master of the Rolls, who decreed an account, and directed allowances to be made for what the factor had expended on account of the ship or cargo, and reserved all further directions till after the master's report. It came on again, afterwards, for further directions, after the master's report, before the Lord Chancellor, who was attended by four eminent merchants, whom he interrogated publicly. After which he took time to consider of it; and on the first of *Febru-*

Ambler's
Rep. 252.

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ary 1755, decreed, "that the factor has a lien on goods consigned to him; not only for incident charges, but as an item of mutual account for the general balance due to him so long as he retains the possession. But if he part with the possession of the goods, he parts with his lien, because it cannot then be retained as an item for the general account." There was another case, in the same court, of *Gardiner v. Coleman*, a few months after; in which the former case, determined as I have mentioned, was considered as a point settled; and this latter case of *Gardiner v. Coleman* was decreed agreeably to it. So that Mr. *Amyand*, even considered as factor or agent to *Meybohm*, and as making the insurance upon *Meybohm's* account, is yet entitled to retain the policy; *Meybohm* being indebted to him upon the balance of the account between them; and he has a lien upon the policy, whilst it continues in his possession. Therefore, even in this view of the case, Mr. *Tamez* must first have paid to *Amyand* the balance of his (*Amyand's*) account, before he could have gotten that policy out of *Amyand's* hands; and consequently, Mr. *Tamez* was very far from being entitled to the benefit of it as a *cestui que trust*, absolutely and entirely.

But if the question, "Whether *Tamez* could take the benefit of Mr. *Amyand's* policy?" were doubtful; yet here, *Tamez* insured the goods with the defendants, expressly under the declaration of his suspicion, that there might have been a former consignation, and some former insurance made upon the goods by some other person: but he desired to insure the whole for his own security; and to this the defendants agreed, and took the whole premium. Mr. *Amyand* insisted upon his right to the whole benefit of his own policy, when he was examined as a witness: and is now litigating it in Chancery. It would neither be just nor reasonable, that *Tamez* should only recover half of his loss from the defendants, and be turned round for the other half, to the uncertain event of a long and expensive litigation. I do not believe there ever will or can be a recovery by *Tamez*, or those who shall stand in his place, against *Amyand's* underwriters. However, if those underwriters are liable to contribute at all, the contribution ought to be among the several insurers themselves: but *Tamez*, the insured, has a right to recover his whole loss from the defendants, upon the policy now in question, by which they are bound to pay the whole. For though there
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be two insurances, yet it is not a double insurance; to call it so is only confounding terms. If *Tamefsz* could recover against both sets of insurers, yet he certainly could not recover against the underwriters of *Amyand's* policy, without some expence; nor without also first paying and re-imbursing to Mr. *Amyand* the premium he paid, and also his charges. This is by no means within the idea of a double insurance. Two persons may insure two different interests; each to the whole value; as the master for wages; the owner for freight, &c. But a double insurance is where the same man is to receive two sums instead of one, or the same sum twice over for the same loss, by reason of his having made two insurances upon the same goods, or the same ship. Mr. *Tamefsz* is entitled to receive the whole from the defendants, upon their policy; whatever shall become of Mr. *Amyand's* policy: and they will have a right in case he can claim any thing under Mr. *Amyand's* policy, to stand in his place, for a contribution to be paid by the other underwriters to them. But still they are certainly obliged to pay the whole to him. Therefore upon these grounds and principles, in every light in which the case can be put, we are all of us clearly of opinion, that the verdict is right, as it now stands for the whole; and that the *posse* must be delivered to the plaintiff.

In the course of what has been said upon double insurance, no notice has been taken of the laws of foreign states respecting that point: the reason of this silence is the great contrariety to be found in their laws upon the subject; it being almost impossible to mention two countries, whose regulations, as to this matter, are similar. In one the contract is absolutely void, and a forfeiture ensues: in others, if the first policy amount to the value of the effects laden, the other insurers shall withdraw their insurance, retaining one half *per cent.* and in some other countries, the double insurance is merely void, without any forfeiture being incurred. When there is such a diversity in the ordinances upon the subject, it seemed needless to enter into them, especially as the law of *England* with respect to double insurance is so clear, and so well-founded in reason and natural justice, as to require no illustration or confirmation from the laws of any other country.

Ord. of Mid.
dleb. 2 Mag.
p. 77. Ord.
of Fran. and
Stockh.
2 Mag. 172.
267.
Ord. of Billb.
2 Magens,
p. 411.

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Vide ante,
P. 1.

Having, in this and the five preceding chapters, treated of those circumstances, by which the contract of insurance is rendered void from its commencement, on account of some radical defect, which prevents the policy from ever having any operation at all, and having, in the course of that inquiry, been led into a variety of discussion, involving in it a very material part of the law of insurance: we shall proceed to shew in what cases the policy, although not void *ab initio*, is rendered of no effect, because the insured has not himself fully complied with those conditions, which he has either *expressly* or *tacitly*, from the nature of his contract, undertaken to perform. It was indeed observed in the first chapter of this work, that although the policy is not subscribed by the insured, yet there are certain conditions to be performed on his part, with as much good faith and integrity as if his name appeared at the foot of the policy: otherwise it is a dead letter, and he can never recover an indemnity for any loss, which he may happen to sustain.

CHAPTER THE SIXTEENTH.

Of Changing the Ship.

OF those causes which will operate as a bar to the insured's recovering upon a policy of insurance against the underwriter, the first to be mentioned is that of changing the ship; or, as it has commonly been called, changing the bottom. This will require but very little discussion. We formerly said, that, except in some special cases of insurances upon *ship or ships*, it was essentially requisite to render a policy of insurance effectual, that the name of the ship, on which the risk was to be run, should be inserted. That being done, it follows as an implied condition that the insured should neither substitute another ship for that mentioned in the policy before the voyage commences, in which case there would be no contract at all: nor during the course of the voyage remove the property insured to another ship, without the consent of the underwriter, or without being impelled by a case of unavoidable necessity. If he do, the implied condition is broken, and he cannot recover a satisfaction, in case of a loss, from the insurer; because the policy was upon goods on board a particular ship, or upon the ship itself; and it becomes a material consideration in a contract of insurance, upon what vessel the risk is to be run; since the one may be much stronger, and more able to resist the perils of the sea; or by its swift sailing, much better able to escape from the pursuit of an enemy, than the other.

C H A P.
XVI.Vide ante,
c. 1.

Malynes, it is true, in his *Lex Mercatoria*, appears to be of a different opinion; for he says, "It sometimes happens, that upon some special consideration, this clause forbidding the transferring of goods from one ship to another is inserted in policies of assurance; because in time of hostility or war between princes, it might be unladen, in such ships of those contending princes, by which the adventure would be increased. But according to the usual insurances which are made generally without an exception, the assurer is liable thereunto; for it is understood, that the master of a ship, without

Mal. Lex
Merc. 118.

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“ without some good and accidental cause, would not put the goods from one ship to another, but would deliver them, according to the charter-party, at the appointed place.” The reason given by *Malyne*, in support of his position, is by no means satisfactory, nor is it well founded in point of experience: neither has he adduced a single authority to corroborate the opinion advanced. Indeed, the whole current of authority turns the other way: at least, as far as I have been able to trace it.

Molloy, l. 2,
c. 7. l. 11.

Molloy has said, that if goods are insured in such a ship, and afterwards in the voyage she becomes leaky and crazy, and the supercargo and master, by consent, become freighters of another vessel for the safe delivery of the goods; and then after she is loaded, the second vessel miscarries, the assurers are discharged. It is true, the sentence proceeds thus: “ If these words be inserted, namely, *the goods laden to be transported and delivered at such place by the said ship, or by any other ship, or vessel, until they be safely landed*, the insurers must answer the misfortune.” But this does not at all affect the general rule before laid down; for it only goes to shew that, which is not denied, that the parties may take a case out of the general rule of law, by a special agreement: and the exception proves the truth of the first proposition. Besides, in such a case, it should seem that the ship, in which the goods are laden, ought not to be changed, but upon necessity.

Roccus de
Asscurat.
No. 28.

This opinion is confirmed by foreign writers. “ *Merces si eâdem navigatione transferantur de unâ navi in aliam, et si novissima navis, ubi merces transfusæ fuerunt, deperdatur, tunc est inspicienda forma asssecurationis, in quâ si fuit dictum, quod asssecurentur merces, quæ sunt in tali navi, tunc asssecurator non tenetur, eo quod mentionem fecit in asssecuratione de tali navi. Et ratio est, quia non par est ratio asssecurationis, quando merces debebuntur in unâ navi, et quando in alterâ; imo solet id principaliter considerari inter ipsos asssecuratores, cum una navis sit magis fortis quam alia.*” *Roccus* is corroborated by several learned writers upon this branch of jurisprudence.

Senter, de
Asscurat.
p. 3. n. 34.
Stracca gloss.
§. n. 10.

In the law of *England*, there is only one case to be met with in print upon the subject; and that is not expressly in point to the

the present inquiry, although it seems to decide it. It was a case which came on at *Guildhall* before Lord Chief Justice *Lee*. The plaintiff had insured interest or no interest on *any ship* he should come in from *Virginia* to *London*, beginning the adventure on his embarking on board such ship; the money to be paid though his person should escape, or the ship be retaken. He embarked on the *Speedwell*; but she springing a leak at sea, he went on board the *Friendship*, and arrived safe at *London*; but the *Speedwell* was taken after he left her. And now, in an action against the underwriter, he was held liable; for the insurance is on the ship the plaintiff set out in: and had that got safe home and the other been lost, the plaintiff could not have recovered upon the ground of having removed his person into that ship in the middle of the voyage.

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Dick v. Barrell, 2 Str. 1248.

From this case it appears, that although no ship was named in the policy, yet the moment the ship was ascertained by the embarkation of the insured, the contract was at an end, provided the second ship had been lost; for so the words in *Italics* expressly import. *A fortiori*, therefore, the insured could not be entitled to recover, upon a change of the bottom, when the name of the vessel is expressly mentioned in the very instrument by which the contract is effected. And although the insured, notwithstanding the change of bottom, recovered in the case cited from *Strange*; it may be accounted for in two ways, consistent with the doctrine advanced in this chapter. In the first place, it was a gaming policy, interest or no interest; and the plaintiff was entitled to recover the moment the ship was taken, although he might perhaps not be interested at all; or perhaps the effects insured might be left in the first ship, although the plaintiff removed his person; in which case even at this day, upon a fair *bonâ fide* policy, he would be entitled to recover from the underwriters a satisfaction for the loss he had sustained.

The general doctrine relative to changing the bottom of the ship was alluded to by Lord *Mansfield*, when delivering the opinion of the court in the case of *Pelly* against the *Royal Exchange Assurance Company*, which has already been fully reported in a preceding chapter. "One objection," said his Lordship, "was formed by comparing this case to that of "changing the ship or bottom, on board of which goods are "insured:

Vide ante, c. 2. p. 55. 1 Burr. 351

- C H A P. "insured: *which the insured have no right to do* (a). For there
 XVI. "the identical ship is essential; *that* is the thing insured. But
 "that case is not like the present."

From this passage it is evident, that Lord *Mansfield* intended to confirm the principle advanced in this chapter, namely, that when an insurance is made on a specific ship, and the insured not being impelled by any necessity, without the consent of the underwriter, changes the ship in the course of the voyage, he has not kept his part of the contract, and cannot recover against the underwriter.

(a) This is to be taken as a rule, subject to the exception of inevitable or urgent necessity: for it has been held, that the owners of goods insured, by the act of shifting the goods from one ship to another, do not preclude themselves from recovering an average loss arising from the capture of the second ship, if they act from necessity, and for the benefit of all concerned. See *Plantamour v. Staples*, 1 Term Rep. 611. note (a) and ante, chap. 1.

CHAPTER THE SEVENTEENTH.

Of Deviation.

DEVIAION, in marine insurances, is understood to mean a voluntary departure, without necessity or any reasonable cause, from the regular and usual course of the specific voyage insured. Whenever a deviation of this kind takes place, the voyage is determined; and the underwriters are discharged from any responsibility. It is necessary, as we have seen, to insert in every policy of insurance, the place of the ship's departure, and also of her destination. Hence it is an implied condition to be performed on the part of the insured, that the ship shall pursue the most direct course, of which the nature of things will admit, to arrive at the destined port. If this be not done; if there be no special agreement to allow the ship to go to certain places out of the usual track; or if there be no just cause assigned for such a deviation; it is but just and reasonable that the underwriter should no longer be bound by his contract, the insured having failed to comply with the terms on which the policy was made. For if the voyage be changed after the departure of the ship, it becomes a different voyage, and not that, against which the insurer has undertaken to indemnify: (which is the true objection to a deviation) the risk may be ten times greater, which probably the insurer would not have run at all, or at least would not, without a larger premium. Nor is it at all material, whether the loss be or be not an actual consequence of the deviation; for the insurers are in no case answerable for a subsequent loss, in whatever place it happen, or to whatever cause it may be attributed. Neither does it make any difference, whether the insured was, or was not, consenting to the deviation.

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Vide ante,
c. 1.

Roccus,
Not. 52.

Douglass Rep.
288.

These principles have been established by many decisions in the various courts of *Westminster Hall*; and also by a solemn determination in the House of Lords.

The plaintiff was a shipper of goods in a vessel bound from *Dartmouth* to *Liverpool*: the ship sailed from *Dartmouth*, and put into *Lee*, a place *she must of necessity pass by*, in the course of the insured voyage. But as she had no liberty given her by the policy

Fox v. Black, Exeter assizes, 1767, before Mr. Justice Yates.

C H A P. XVII. policy to go into *Loo*, and although no accident befel her in going into, or coming out of *Loo* (for she was lost after she got out to sea again), yet Mr. Justice *Yates* held that this was a deviation, and a verdict was accordingly found for the underwriters.

Townson v. Guyon, before Lord Mansfield. In another case, an action was brought upon a policy on goods and other merchandizes, loaded on board the ship called the *Charming Nancy*, from *Dunkirk* to *Leghorn*. The ship came to *Dover* in her way to procure a *Mediterranean* pass; and was afterwards lost.

Lord *Mansfield* was of opinion, that the calling at *Dover* was a deviation; and the plaintiff was nonsuited.

It was also held by Lord Chief Justice *Lee*, that if the master of a vessel put into a port not usual, or stay an unusual time, it is a deviation, and discharges the insurer. But the time which a ship is detained in the port for necessary repairs, the insurance being *at and from*, shall not be considered *unnecessary delay* so as to avoid the policy. Lord *Kenyon* said, the policy attached on the ship while she was undergoing repairs; it was in such a case not necessary that she should be fit to proceed on the voyage at the time of the insurance. The underwriter took into his consideration the time she might be necessarily detained.

Smith v. Surridge, 4 Esp. 25.

It has also been held that even where there is a permission given to *touch and stay* at a place, that confers no privilege on the assured to *break bulk*, or to unload any part of the cargo. The case which was so decided was an insurance on goods at and from *Whitehaven* to *St. Michael's*, with liberty to touch and stay at any place or places whatsoever, and *particularly at Cork in her passage out*. The ship was driven by stress of weather into *Dublin*, and there she unloaded a great part of the coals, of which her cargo consisted, and then proceeded on her voyage and was lost.

Stitt v. Wardel, Sittings at Guildhall after Mich. 1797.

Lord *Kenyon*, C. J. was of opinion that as the liberty given was only to *touch and stay*, but not *to trade*, the unloading and selling the coals, though the ship was not further delayed thereby, was a *breaking bulk*, and avoided the policy: and upon being asked by the plaintiff's counsel, his lordship said, he should have been of the same opinion, if this *breaking bulk* had happened at *Cork*; and the plaintiff was nonsuited.

So a vessel having liberty to discharge goods at *Lisbon*, is not at liberty to take in any there, although there be a return of premium if she sails thence with convoy, and only waits till convoy is ready.

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Sheriff v.
Porta. Sit.
after M.T.
1803.

The two cases upon this subject just referred to, though the decisions of two most eminent judges, were never brought under the review of the Court. But in a subsequent case they were very considerably shaken, although in the case about to be quoted, the insurance was upon *ship and freight*, and not upon goods; and Lord *Ellenborough* expressly reserved his opinion upon any case of insurance on goods till the point should arise. In the case now to be mentioned, which was an insurance at and from the ship's loading ports on the coast of *Spain* to *London*, with liberty to touch and stay at any port or place whatsoever, the jury found expressly, that the going into, and staying at *Gibraltar* was of necessity, in order to procure a supply of provisions, and that the stay was not longer than the necessity required: and it was proved that, while the vessel lay there, the captain received on board some chests of dollars. This fact, and this finding of the jury raised the question of law, whether the taking in the additional cargo of dollars was a breaking of bulk in the course of the voyage, at a place where there was no liberty to trade given by the policy, so as to avoid it, as increasing, or having a tendency to increase the risk. The point was very fully argued; and the counsel, who argued that this amounted to a deviation, relied on the two cases last quoted.

Raine v.
Bell, 9 East,
195.

But the Court were unanimous in deciding, (and they delivered their opinions *seriatim*), that as the jury had found that the whole period of the ship's stay was covered by the necessity which originally induced her to go into *Gibraltar*, there was no implied warranty in such a policy that the ship shall not trade, so as no delay be actually occasioned. And as to the temptation to deviate held out to the master, that must always be a question for the jury, as in other cases of fraud, whether the deviation or delay arose from the trading or from necessity: and an intention to deviate, not carried into effect, will not avoid a policy, still less can a temptation to deviate avoid it.

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The next case to be reported underwent a variety of discussion in the several courts in *Scotland*; and in all of them judgment was given against the underwriters: but upon an Appeal to the House of Lords, the various decrees of the courts below were reversed, agreeably to those principles adduced in the beginning of this chapter, and which have been uniformly admitted as found law.

Elliot and
others v.
Wilson and
Co. 7 Bro.
Parl. Cases,
p. 459.

The harbour of *Carron*, situate near the head of the *Frith* of *Forth*, is chiefly resorted to by ships in the service of the *Carron* Company, who have a great iron work and considerable collieries in the neighbourhood. From thence vessels, intended principally to convey the manufactures of the Company, their coals, and such goods as may be offered them on freight, sail periodically for *Hull*, and other places on the *Eastern* coast of *England*. This is a coasting or carrying trade, the vessels in going down the *Frith* touching at different places to take in additional loading, or to discharge part of what they have received at places higher in the river. Particularly it is usual for these vessels to call at *Borrowstouness* and *Leith*, and at *Morrison's Haven*, a port six miles farther down the *Frith*, and on the same side with *Leith* in the bay of *Prestonpans*. In *February* 1774, the respondents had occasion to ship fourteen hogheads of tobacco on board one of these vessels for *Hull*; and desiring to insure them, gave the following instructions in writing to *Hamilton* and *Bogle*, insurance brokers in *Glasgow*: "Please to insure for our account by the "*Kingston*, *George Finlay*, master, from *Carron* to *Hull*, with "*liberty to call as usual*, fourteen hogheads of tobacco;" and these instructions were entered in the brokers' books for the perusal of the underwriters, as is the practice at *Glasgow*. Upon the 9th of *February*, the appellants underwrote a policy of insurance in these terms: "beginning the adventure of the said tobacco, at and from the loading thereof on board the said ship "*Kingston* at *Carron* wharf, and to continue and endure until "*said Kingston* (being allowed a liberty to call at *Leith*) shall arrive at *Hull*, and there be safely delivered." The respondents were not privy to the allowance to call at *Leith*, being thus substituted in the policy for the more general term, *as usual*, mentioned in the instructions to the broker. The premium agreed on was 1*l.* 5*s.* per cent. a rate equal, at least, if not higher, than

was usual to be given in the voyage, in cases where it was understood, or expressed in the policy, that the vessel might touch at the customary ports. And in particular some of these appellants in *February 1772*, underwrote a policy upon this very vessel, and for the same voyage, with liberty to call at *Leith* and *Morrison's Haven*, at a premium of one *per cent.* only. The vessel thus insured had sailed from *Carron* five days before the date of the policy, that is, on the 4th of *February 1774*, it did not call or touch at *Leith*, but put into *Morrison's Haven*: set sail from thence on the 9th, got safe into the direct course from *Carron* to *Hull*, cleared the *Frith of Forth*, and proceeded with a fair wind, till on the evening of the 10th the vessel, being overtaken by a storm at *Holy Island*, on the coast of *Northumberland*, was wrecked and the cargo totally lost. All these were facts admitted; nor was it alleged by the appellants, that the ship received the smallest damage in going into or coming out of *Morrison's Haven*. Intelligence of this misfortune reached *Glasgow* on the 14th of *February*, when the respondents for the first time saw the policy of insurance, or understood that it differed in terms from their instructions to the broker, in whose hands it remained. It did not, however, occur to them, that this slight variation would afford a pretext to the underwriters for refusing payment: nor does it seem to have then occurred to those gentlemen, who wrote immediately to the respondents, desiring they would request the *Carron Company* to give the necessary orders for preserving the tobacco, and forwarding it to *Hull*, promising to contribute towards the expence, so far as they were interested. Upon the 24th of *February*, however, the appellants, in an instrument drawn by a publick notary, protested against the ship's having gone into *Morrison's Haven*, as a deviation from the terms of the policy, which only contained a liberty to call at *Leith*; and absolutely refused payment of the loss. On this refusal, the respondents brought their action against the appellants in the court of admiralty in *Scotland*, the only competent court for determining questions about insurances, and other maritime affairs in that country, in the first instance. The appellants put in their defence, which was followed by other pleadings, in *January 1775*, the Judge Admiral pronounced the following interlocutor (or decree): "Having considered the whole circumstances of this case, and in particular that it is not alleged by the defenders, that the pursuers were in the knowledge of the ship the *King*;
" *Non*

C H A P. " *Shon* being intended to put into *Morrison's Haven*, he repels the
 XVII. " defence pleaded by the defenders." The appellants reclaimed
 against this interlocutor (petitioned for a review of the sentence),
 and answers being put in to their petition, the Judge Admiral,
 because they set forth, and seemed to found on conversations
 between them and the brokers, at the time of underwriting or
 settling the terms of the policy, allowed them to bring proof of
 what passed at and previous to making the insurance. But the
 appellants presented a second petition, declining to go into any
 proof, insisting that the cause turned singly upon the words of
 the policy, and demanding judgment on the abstract question,
 whether the vessel touching at *Morrison's Haven*, when not al-
 lowed by the policy, discharged the underwriters? whereupon
 the Judge again decreed in favour of the respondents. The ap-
 pellants then sued out a writ of suspension from the Court of
 Session, of these sentences of the Judge Admiral; and after the
 usual preliminary step of procedure before the Lord Ordinary,
 the cause being reported to the whole bench of Lords, their
 Lordships having before them the opinions of several of the most
 eminent merchants both in *England* and *Scotland*, gave judgment
 for the respondents, in the month of *January 1776*, in the fol-
 lowing terms: " Having advised informations, *hinc*, *inde*, and
 " considered the policy of insurance and the whole circum-
 " stances of the case, the Lords repel the reasons of suspension,
 " find the letters orderly proceeded," (that is, that the appel-
 lants were obliged to pay the sums underwritten, in terms of the
 Judge Admiral's decree,) " and their Lordships decree accord-
 " ingly." The appellants having also reclaimed against this in-
 terlocutor, it was, in *March 1776*, finally confirmed. From
 these several decrees the present appeal was brought; and the
 House of Lords were of opinion, that a wilful deviation from the
 due course of the insured voyage, is in all cases a determination
 of the policy; that, from that moment, the engagement between
 the insurers and insured is at an end; that it is immaterial from
 what cause, or at what place, a subsequent loss arises, the in-
 surers being in no case answerable for it: that the going into
Morrison's Haven was a wilful deviation from the due course of
 a voyage from *Carron* to *Hull*: that though it may be true, as
 contended on the part of the respondents, that ships sailing
 through the *Frith of Forth* have sometimes been permitted by
 the terms of a policy, underwritten at the same premium as the
 present

present, to go into that port, it could not avail in the present case, since the policy in question had given no such permission. It was therefore ORDERED AND ADJUDGED that the interlocutors complained of should be reversed.

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In a late case upon a policy of insurance on a ship "*at and from Fisherow to Gottenburgh, and back to Leith and Cockenzie*," it appeared that in the homeward voyage she went *first* to *Cockenzie*, which lay nearer to *Gottenburgh* than *Leith*, and was stranded in the harbour of *Cockenzie*. There was a good deal of evidence given to shew that *Leith* harbour was the safer of the two; but the jury seemed to be of opinion, according to a note taken by Lord *Kenyon* at the time, that the construction of the policy was to be made by attending to the order in which the places were named in it. The jury, however, by consent of parties, to save the expence of going to trial again, found a verdict for the plaintiff, with permission to enter a verdict for the defendant, if the court should agree that the above construction was the true one. The case came on to be discussed in court; and they were of opinion, that unless there be some usage proved, or some special facts to vary the general rule, the party insured must go to the several places mentioned in the policy, in the order in which they are named; and that to depart from that course is a deviation: and one of the Judges added, that the parties by inserting the names contrary to the *natural* order of the places, shewed it to have been the intention of the parties to vary the natural course of the voyage. A verdict was entered for the defendant.

Batson v. Haworth.
6 Term Rep.
531.

In the argument of the preceding case, another was quoted by one of the learned Judges, as having been decided before Lord Chief Justice *Lee*, where in an insurance on the *Gothic Lyon at and from London to her ports of discharge in the Streights as high as Messina*, his Lordship was of opinion, as she did not stop at *Marfeilles* (for which place she had a cargo) in her way to the Streights, but meant to take it in her return, that this was acting contrary to the terms of the policy: for by her ports of discharge, must be understood such ports as it was intended goods should be delivered at, and the first of these was *Marfeilles*.

Clafon v. Simmond, at Guildhall, Hil. Sittings 1742.

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Hogg. v.
Horner, Sitt.
at Guildhall
after Mich.
Term, 1797.

So in a very late case, where a ship was insured “ at and from *Lisbon* to a port in *England*, with liberty to call at any one port “ in *Portugal* for any purpose whatever: and where the ship had sailed from *Lisbon* to *Faro* to complete her loading, *Faro* being a port to the southward of *Lisbon*, consequently lying directly out of the course of the voyage to *England*: Lord *Kenyon* was of opinion that the liberty, given by this policy, must be restrained to a permission to call at some port to the northward of *Lisbon*, in the course of the voyage to *England*; and that by going to the southward the assured had been guilty of a deviation.

These cases seem clearly to have decided that where several *termini* are mentioned in a policy of insurance, as the objects of the assured, those ports must be gone to in the order in which they are mentioned in the policy, otherwise the assured will be guilty of a deviation. But it was lately endeavoured to apply the principle of those cases to one, which it was considered by the court, did not interfere with those previously before them for judgment.

Mission v.
Reid.
3 East's R.
572.

It was an action on a policy on goods on board the *Franklyn*, at and from *Liverpool* to *Palermo*, *Messina*, *Naples*, and *Leghorn*. The ship took in goods and was cleared out for *Naples* only, and had no goods on board for any other place, *Leghorn* being known to be in the hands of the *French* soon after the policy was effected. The ship was captured in the Bay of *Biscay* by the *French*, and consequently before the dividing point, to any of the places mentioned in the policy. The plaintiff recovered a verdict. A new trial was moved for on two grounds, one of which only is material here, namely, that there was no inception of the voyage insured, which was to *Palermo*, *Messina*, and *Naples*, in the order in which they stand in the policy, as in *Beatson v. Haworth*: whereas here it appeared that the vessel never intended to go to *Palermo* or *Messina*, but only to *Naples* for which place she took in her loading and cleared out.

Supra 393.

Lord *Ellenborough* said, “ This is not a question of deviation; to raise which, it must be assumed that the voyage insured was commenced, and that the ship afterwards went out of her track, on that voyage; but there is no question of that sort here; the

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loss happened before the dividing point, to any of the places named in the policy : the only question is, whether there were any inception of the voyage insured ? and I am clear that there was. I think that the voyage insured to *Palermo, Messina, and Naples*, meant a voyage to all, or any of the places named ; with this reserve only, that if the vessel went to more than one place she must visit them in the order described in the policy. The assured must only not invert the order of the places, as they stand in the policy. And that was in truth all that was decided in the case of *Beatson v. Haworth* ; where it must be remembered that the vessel had taken in goods for both the places named, *Leith* and *Cockenzie*, and it was assumed that she put into *Cockenzie*, first, in her way to *Leith*, where she was to discharge the rest of her cargo.

Mr. Justice *Lawrence*.—Why are we to suppose that the underwriters meant to stipulate that at all events the ship should take the *circuitous* instead of the *direct* course ? Is it not rather to be presumed, that if the question had been put to the underwriters, whether they meant to insist that the ship should go round by each of the places named to *Naples*, they would have answered in the negative, because, if she went the direct course to *Naples*, it would lessen their risk. It is admitted at the bar, that if the ship had cleared out for the first place named in the policy, the risk would have commenced, although there had been no intention of prosecuting the voyage further. Then there is an end of the objection, that the voyage commenced is not identified with the voyage insured. And *Beatson v. Haworth* only decided that if the ship go to more than one of several places named in the policy, she must take them in the order in which they stand. The two other judges concurred.

These principles being once established, it follows, as a necessary consequence, that however short the time of deviation may be, if only for a single night, or even for an hour, the underwriter is equally discharged, as if there had been a deviation for weeks or months ; for the condition being once broken, no subsequent act can ever make it good.

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Cock v.
Townson,
C. B. before
Ld. Camden,
Ch. Just.

The ship *George* was bound from *Cork* to *Jamaica* with a convoy in the course of a war : the captain, in concert with two other vessels, took advantage of the night, and being ships of force, cruised, and thereby deviated out of the direct course of their voyage, in hopes of meeting with a prize. Lord *Camden* clearly held, and a special jury of merchants, agreeably to his directions, determined, that from the moment the *George* deserted or deviated from the *direct voyage* to *Jamaica*, the policy was discharged.

In a modern case, however, it seemed to be the general opinion of Lord *Mansfield*, and a special jury, and was sworn to be the usage, by several witnesses, that if a merchant ship carry letters of marque, she may *chase* an enemy, though she may not *cruise*, without being deemed guilty of a deviation.

Jolley v.
Walker, at
Guildhall,
East Va.
1781.

This was an insurance on goods and the ship *Mary* from *London* to *Cork* and the *West Indies*, and the ship was warranted to proceed on that voyage with 60 men, and equipped with 22 guns, 18 and 6 pound shot, and sheathed with copper. The question was, whether a ship having letters of marque could chase an enemy's ship without being said to have deviated ? The facts were that the ship sailed with letters of marque on board against the *French*, *Spaniards*, and *Americans*, and was ordered not to cruise ; but to proceed direct on her voyage to the *West Indies* ; but in the event of her meeting or coming within sight of any ship belonging to the enemy, she was to chase, take, and make prize of such enemy's ship, if in her power. In the 26 *December* 1780, in latitude 14. 22 N. and longitude 40. 52 W. at midnight, a sail was discovered, whereupon the *Mary* gave chase, and on such vessel's perceiving the *Mary*, she hauled her wind to the northward, and the *Mary* hauled up after her, and at one o'clock lost sight of her ; but the *Mary* still stood to the northward, and at five A.M. saw such vessel again on the lee-bow two miles off. The chase was renewed, and at six A.M. the *Mary* came up within three-quarters of a mile of the vessel, when she hoisted *Spanish* colours, and at half past seven the *Mary* came up within pistol shot and began to engage, which engagement continued till ten o'clock, when the *Spanish* vessel sheered off, leaving the *Mary* much disabled. She afterwards steered her course

to the westward and was taken on the 5th of *January* 1781, by an *American* privateer (a). It was agreed on all hands, that a ship, in such circumstances, might not cruise; and several witnesses spoke to the usage and practice of ships, which carried letters of marque, chasing an enemy. It was admitted on the part of the insurers, that if an enemy came in the way, the ship must defend or engage; but contended, that if the letter of marque lost sight of the enemy, that was no longer chasing, but cruising. Lord *Mansfield* left it upon the evidence to the jury, who found for the plaintiffs.

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Where a merchant ship, employed in commercial objects, was insured *with or without letters of marque*, with a liberty to *chase, capture, and man prizes*, the captain is not justified, after he has captured a vessel, in the further prosecution of his voyage, in *shortening sail and lying to*, in order to let the prize keep up with him, for the purpose of protecting her, as a *convoy* into port, in order to have her condemned, though such port be within the voyage insured; for that would be to extend the meaning beyond what the parties have themselves expressed, by giving them leave to *convoy*, as well as to *chase, capture, and man*, which words alone extend the rights of the assured beyond the common terms of indemnity in the policy.

Lawrence v.
Sydeborough.
6 East 45.

But in another case, which was also the case of an insurance on a commercial adventure, at and from *Liverpool to Africa*, &c. *with or without letters of marque*, it became a question, whether those words enabled the ship to *chase* for the purpose of hostile attack and capture, all vessels whensoever or wheresoever described, provided the original pursuit commences from a point in the course of the voyage, without suspending or superseding wholly the objects, destination and limits of the commercial adventure described in the policy: or whether they are to be confined to a leave to employ force for the purpose of *defence* (including a liberty of attack and chase,) only so far as they may fairly be supposed to promote ultimate security. The court were of opinion that the case of *Jolly v. Walker* did not afford any con-

PART V.
Anderson.
6 East 202.

(a) The facts of this case are now more accurately stated than they were in former editions, as they were communicated by Lord *Ellenborough* to the court, from the original brief, which he had obtained, when he delivered his opinion in *Part v. Anderson*.

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struction of a policy containing the liberty in question, inasmuch as that policy contained no such liberty. Therefore in the absence of any determination on the effect of such words, the court sent the case to a second trial, in order to ascertain, as a question of fact, in what manner the parties to such contracts have acted upon them in former instances, by paying losses, where deviations of the kind now in question have happened; and whether they have as yet obtained in use and practice, as between assured and assurers, any and what known and definite import.

Guildhall,
March 6,
1805.

This case came on to be tried again before Lord *Ellenborough* and a special jury. From my memory of what passed, having been one of the counsel in it, aided by a note which I have seen, his Lordship was strongly of opinion on the evidence, that this vessel had cruized, which of course, if the jury so thought, would put an end to the question. The jury found for the defendant; and I have no doubt upon that ground, from the evidence of the plaintiff's own witnesses.

Jarret v.
Ward.
3 Campbell,
N. P. 263.

Consistently with this principle, that the court will not extend the meaning of a licence beyond what the parties have themselves expressed, where leave was granted by the policy to a merchant ship engaged on a fishing voyage to *cruise for, chase, capture, man, and see into port any ship or ships of enemies*, Lord *Ellenborough* was of opinion that such a permission did not authorize the ship to remain in port till a prize receives necessary repair, which she could not have had otherwise: at most she might have entered the port with the prize, seen her safely moored, and perhaps have stopped a reasonable time to give directions for proceeding on the final destination. For if the captor were permitted to stay till the prize was repaired, the voyage might never terminate, for on leaving *St. Catharine's* (the port to which this prize had been carried) another prize might have been taken, standing equally in want of repairs; afterwards a third, and so on in an infinite series. This therefore, said Lord *Ellenborough*, turns out to be a risk, which the defendant did not underwrite.

In a case which came before the Court of King's Bench upon a motion for a new trial, the Judges were unanimously of

opinion, that if the assured, without the knowledge of the underwriters, take out a letter of marque (but without a certificate, which by the prize act of the 33 Geo. III. ch. 66. s. 15. is absolutely necessary to its validity), for the purpose of inducing the seamen to enter, and without any intention of cruising, this does not so essentially vary the risk as to avoid the policy.

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The doctrine that a voluntary deviation from the voyage insured vitiates the policy, has been held to be applicable to an insurance upon *freight* as well as to an insurance upon ship and goods.

Thus in a case upon a policy of assurance *on freight* of the ship *Bethiab* at and from *Bordeaux* to *Virginia*, warranted *American* ship and property: the declaration alleged that the ship was an *American* ship and the property of *American* subjects. The plaintiff proved the ship to be *American*, and it was to have been contended upon the part of the defendant, that the warranty extended to the goods on board as well as to the ship: but upon the evidence it appeared that the goods, whether *American* or not, were to be carried in the ship from *Bordeaux* to *Saint Domingo*, and that she was only to call at *Norfolk* in *Virginia* for orders; this rendered it unnecessary to discuss or decide the question upon the construction of the warranty, Lord *Kenyon* being of opinion, that the underwriters upon this policy had a right to expect that the goods, upon which the freight was payable, were consigned to *Virginia*, and that if the freight was payable for the carriage of them from *Bordeaux* to *Saint Domingo*, the underwriters were not liable for the loss, though the ship was to call at *Norfolk* for orders, the freight payable being in such case different from the freight insured: plaintiff was nonsuited, and no application was made to set it aside.

Murdoch v.
Potts, Sitt.
at Guildhall
after Trin.
T. 1795.

But though the consequences of a voluntary deviation are fatal to the validity of the contract of insurance, yet wherever the deviation arises from necessity, force, or any just cause, the underwriter still remains liable, although the course of the voyage is altered.

Roccus,
Not. 52.

This rule is illustrated by the following case. The ship *Mediterranean* went out in the merchants' service with a letter of

Ellen v.
Brogden,
2 Str. 1264.

C. C. 4

marque

C H A P. XVII. *marque, and bound from Bristol to Newfoundland, insured by the defendant. In her voyage she took a prize, and returned with it to Bristol, and received back a proportional part of the premium. Then another policy was made, and the ship set out, with express orders from the owners, that if another prize was taken, the captain should put some hands on board such prize, and send her to Bristol; but that the ship in question should proceed with the merchants' goods. Another prize was taken in the due course of the voyage, and the captain gave orders to some of the crew to carry her to Bristol, and designed to go on to Newfoundland: but the crew opposed him, and insisted he should go back, though he acquainted them with his orders; upon which he was forced to submit, and on his return his own ship was taken, but the prize got in safe. And now in an action against the underwriters, it was insisted, that this was such a deviation as discharged them. But the Court and jury held, that this was excused by the force upon the master, which he could not resist; and therefore fell within the excuse of necessity, which had always been allowed. So the plaintiff had a verdict for the sum insured.*

Scott v.
Thompson,
1 New Rep.
181.

So also on a limited policy against *sea-risk and fire only*, in the course of the voyage insured from *Liverpool to Amsterdam*, the ship was carried out of the course of the voyage into *Falmouth* by a king's ship, but being afterwards released, she proceeded towards her destination, and the cargo, which was the subject of the insurance, sustained sea-damage, the underwriters were held liable; for the deviation, which was insisted on as matter of defence, was not voluntary: and deviation occasioned by force, and deviation by necessity are the same; for necessity is force. The case of *Elton v. Brogden* was cited by the Lord Chief Justice (Sir James Mansfield), and also another case of *Driscoll v. Passmore*, 1 Bos. & Pull. 200 and 313. in the course of the argument.

Roccus, 52.
Santar de
Assicur.
part 3. n. 54.

The general writers upon this subject have enumerated the various circumstances, which will operate as a justification to the insured, for leaving the direct tract of the voyage, upon the ground of necessity and reasonable cause: such as to repair his vessel, to escape from an impending storm, or to void an enemy. In our reports of decisions in the *English courts of justice*, we

find instances of all these various excuses being allowed as sufficient to justify a deviation ; and also another species of excuse, namely, to meet a convoy, which, indeed, is nearly connected with that of avoiding an enemy. I shall rank all the cases, which apply to this branch of our enquiry, under these several divisions.

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The first ground of necessity which justifies a deviation, is that of going into port to repair. If a ship is decayed, and goes to the nearest place to refit, it is no deviation ; because it is for the general interest of all concerned, and consequently for that of the underwriters, that the ship should be put in a proper condition capable of performing the voyage.

The ship *Eyles*, being at *Bengal* in the year 1732, the owner employed a Mr. *Halhead* to insure this ship in the *London* Insurance Office for 500*l.* the adventure thereon to commence from her arrival at *Fort St. George*, and thence to continue till the said ship should arrive at *London* ; and that it should be lawful for the said ship, in the said voyage, to stay at any ports or places without prejudice. The *Eyles* came to *Fort St. George* in *February* 1733, in her way to *England* ; but being leaky, and in very bad condition, upon the unanimous advice of the governor, council, commanders of ships, &c. she sailed for *Bengal* to be refitted ; and after being sheathed, in her return upon her homeward-bound voyage, she struck upon the *Engilee Sands*, and was lost. Evidence was read on the part of the plaintiffs, to prove that *Bengal* was the proper place to refit, and that the ship went thither for that reason ; that this was a voyage of necessity, and not a trading voyage, for she took nothing on board but water, provisions, and ballast. When this cause came on to be heard before Lord Chancellor *Hardwicke*, he refused to decide it, but directed an issue at law. His Lordship, however, observed, that the general principles laid down by the plaintiff's counsel were right, as stress of weather, and the danger of proceeding on a voyage, when a ship is in a decayed condition : and in such a case, if she went to the nearest place, he should consider it equally the same, as if she had been repaired at the very place from whence the voyage was to commence, according to the terms of the policy, and no deviation. It is a very material circumstance, that the governor ordered the lading to be taken out, to shew the ne-

Motteux and
others v. the
London As-
sur. Comp.
1 Atk. 545.

C H A P. cessity of the ship's being repaired ; but there is not a syllable of
XVII. proof why she might not have been equally repaired at *Fort St. George*. His Lordship, therefore, directed an issue to try, whether the loss in *July 1733*, was a loss during the voyage, and according to the adventure which was agreed upon, or intended to be insured. On a trial at *Guildhall*, in the Court of Common Pleas, the jury found in favour of the plaintiffs.

Guibert v.
Readshaw,
Sitt. in
Lond. Hil.
Vac. 1781.

This was an action on a policy of insurance on the *Nancy*, at and from *La Rochelle* to the coast of *Africa*, during her stay and trade there, and at and from thence to her port of discharge in the island of *St. Domingo*. Three days after the ship sailed from *La Rochelle*, she met with a gale, which strained her seams, and split her mizen-yard and rigging. The crew came in a body to the captain, desiring for the preservation of their lives to make to some port to repair. The vessel being a new one, and the captain finding that she had too little ballast, complied, and put into *Lisbon*, the nearest port ; from whence, after taking in 500 rolls of tobacco as ballast, he proceeded to the coast of *Guinea*, traded there, and the ship was afterwards captured in the sight of *St. Domingo* before she arrived. The defendant insisted, that going into *Lisbon* was a deviation, and called witnesses, who were of opinion, that in the latitude in which the storm happened, there could be no difficulty in repairing all the damage the vessel was described to have received, even in the worst weather, as she might have proceeded to the coast of *Africa*, and repaired there at a less expence ; and that a ship, loaded like that in question, could not need additional ballast. On the cross-examination, it came out that the premium would not have varied had the voyage been by the way of *Lisbon*.

Lord *Mansfield* left it to the jury, on the ground of necessity to go to *Lisbon* for repairs. He said, that much depended upon the circumstance, that no additional premium would have been required for liberty to touch there. If the jury believed the evidence of the witnesses, they must find for the plaintiff, for that the whole of the defendant's case rested merely upon surmise and suspicions alone. The plaintiff accordingly had a verdict.

The next excuse for leaving the direct course is stress of

in order to escape a storm, goes out of the direct course ; or when in the due course of the voyage, is driven out of it by stress of weather, this is no deviation ; because it was occasioned by the act of God, which, by a maxim of law, is said to work an injury to no man. It has also been held, that if a storm drive a ship out of the course of her voyage, and she do the best she can to get to her port of destination, she is not obliged to return back to the point from whence she was driven. This rule is exemplified by the following case.

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In an action on a policy of insurance of the ship *Atlantic*, warranted to sail with convoy from *England* to *St. Kitt's* on or before the first of *August* ; the question was, Whether there had been a deviation ? The ship was separated from her convoy by a storm. The captain being examined, said, his object, after his separation, invariably was to gain *St. Kitt's*, or to fall in with the convoy. That the ship was taken by an *American* privateer in lat. 34. lon. 59. Several captains were examined, who swore, that they would have taken the same course to get to *St. Kitt's*, or regain the fleet.

Harrington
v. Halkeld.
Sirt. in
Lond. Mich.
Vac. 1778.

Lord Mansfield.—“ The single question is, Whether the captain was taken as he was going to *St. Kitt's* ? If he was not, he is perjured. The account he gives is, that on the 28th of *July* there was a storm, which separated the fleet ; that he did all he could to get to *St. Kitt's*, and to direct his course so as to meet the convoy crossing. The captain goes on the ground not to reason, but to obey, be the consequence what it might. He knows nothing of the insurance : he says to himself, if I obey, I am doing right. As to the protest, I do not see that it contradicts the captain's evidence. Other captains have looked at the log-book or journal ; and they say, they would have held the same course.”

Verdict for the plaintiff.

Upon the subject of a departure from the course of the voyage, on account of stress of weather, another very important point has been determined, though the same principle runs through all the cases, that whatever happens by the act of God, shall not be imputed to man. On this ground it has been held, that if a

C. H. A. P. XVII. ship be driven out of her port of loading by stress of weather into another, and then does the best she can to get to her port of destination, it shall not be deemed a deviation, though she do not return to the port from whence she was driven.

Delaney v. Stoddart,
1 Term Rep.
p. 22.

The case here alluded to was an action upon the case against the defendant, for not having insured a ship and cargo, pursuant to the orders of the plaintiff, by means whereof he was damaged, the ship having been lost (a). It was tried before Mr. Justice *Buller* at *Guildhall*, at the sittings after *Trinity Term* 1785; and a verdict was found for the plaintiff.

Wilkinson v. Coverdale,
Sitt. in B.R. at Guildhall after Mich. Term,
34 Geo. III.
1 Esp. Rep.
75.

(a) It may be proper to explain the nature of this action. When a man undertakes, either by an implied or express promise, to do a thing for another, and he neglects to do it, or does it unskilfully, the law gives the person injured an action for the negligence. This is the case in question with respect to insurance; and the only difference between this action, and that on a policy against the underwriters, is in point of form; for the plaintiff in this action is entitled to recover the exact sum he ordered to be insured: and the defendant is entitled to every benefit, of which the underwriter could have taken advantage, such as fraud, deviation, non-compliance with warranty, &c.

Smith v. Lalcelles,
2 Term Rep.
187.

In a late case, the whole law upon this action was very fully and accurately stated by Mr. Justice *Buller*, and assented to by the whole Court; and upon this occasion that learned judge mentioned the three instances in which such an order to insure must be obeyed, otherwise this action will lie. First, where a merchant abroad has effects in the hands of his correspondent here, he has a right to expect that he will obey an order to insure, because he is entitled to call his money out of the other's hands when and in what manner he pleases. The second class of cases is, where the merchant abroad has no effects in the hands of his correspondent, yet if the course of dealing between them is such, that the one has been used to send orders for insurance, and the other to comply with them, the former has a right to expect that his orders for insurance, will still be obeyed, unless the latter give him notice to discontinue that course of dealing. Thirdly, If the merchant abroad send bills of lading to his correspondent here, he may engraft on them an order to insure, as the implied condition, on which the bills of lading shall be accepted, which the other must obey, if he accept them, for it is one entire transaction. For if the commission from abroad consist of two parts, the one to accept the bill of lading, the other to cause an insurance to be made, the correspondent cannot accept it in part, and reject it as to the rest.

Wallace v. Tellfair,
Sitt. after Trin. 1786, before Mr. Jus. Buller.
2 Term Rep.
188. n. (a)
Smith v. Cologan.
2 Term Rep.
188. n. (a)
Nisi Prius

So also if a merchant here accept an order for insurance, and limit the broker to too small a premium, in consequence of which no insurance can be procured, he is liable to make good the loss to his correspondent.

But if a person, to whom such orders are sent, does what is usual to get the insurance made, that is sufficient; because he is no insurer, and is not obliged to get insurance at all events. Thus if he send to *Lloyd's*, and the underwriters refuse to take the risk at any premium; and he afterwards send to get insurance done at *Newcastle*, he has done his duty, and can never afterwards be charged in this action, more especially if the plaintiff adopt and approve his acts.

Upon a motion for a new trial, the facts appeared to be these: The plaintiff, who lived at *St. Kitt's*, wrote a letter to the defendant, dated the 30th of *April* 1781, informing him that he intended to purchase a ship, and offering the defendant a share. On the 4th of *May* 1781, he wrote a second letter to the defendant, acquainting him that he had purchased the ship, but had only a share in it himself, the residue being divided into three or four more shares, one of which he had reserved for the defendant, in case he should wish to be concerned; and directing an insurance upon the ship *at and from St. Kitt's to London*, warranted to sail with convoy. On the 28th of *June*, the defendant wrote to the plaintiff, that he had no objection to a fourth, or a share equal to the plaintiff's. On the third of *July*, the plaintiff informed the defendant, that the ship had left the port to take in her cargo; that she let go an anchor at *Sandy Point*, but as the wind blew fresh, *she drove out and could not come in again; that she was obliged to go to Eustatius*, and he therefore hoped that the defendant had not neglected to make the insurance, for fear of accidents. The defendant, on the 19th of *July*, wrote thus to the plaintiff: "The insurance you ordered shall be done." Plaintiff again, on the 25th of *July*, wrote, that the *Friendship* did all in her power to get up from *St. Eustatius*, but could not, and therefore he sold her to Mr. *Ross* at *Eustatius*. I have already transcribed as much of the several letters as are material to the subject of this chapter; in addition to which the following facts appeared in evidence: That the ship *Friendship* had sailed from *St. Eustatius*, on the 1st of *August* with the convoy, and that she had afterwards foundered at sea; that *St. Eustatius* is in the direct road to *London* from *St. Kitt's*, and the convoy from *St. Kitt's* always looked into *St. Eustatius*, to take up any ships that might be there; that if the *Friendship* had sailed from *St. Kitt's*, she must have gone by *Eustatius*; but would not have stopped there: that when she was driven to *St. Eustatius*, after making several efforts to get back to *St. Kitt's* to finish her loading, and finding she could not succeed, she then took in the rest of her loading at *St. Eustatius*.

At the trial, several grounds of defence were made; but the only one, material for our consideration was, that the remaining at *St. Eustatius*, and not going back to *St. Kitt's*, was a devia-

C H A P. tion. The learned judge, who tried the cause, was of opinion
XVII. that it was not a deviation, being occasioned by stress of weather. Upon this ground, amongst others, the motion for a new trial was founded.

After argument at the bar,

Lord *Mansfield* said, "The only material question is, Whether there is a deviation in this case? and that depends on the evidence. If a storm drive a ship out of her voyage into any port, and being there, she does the best she can to get to her port of destination, she is not obliged to return back to the point from whence she was driven; but here the witnesses say, she tried to get back to *St. Kitt's* and could not: and it is a much easier navigation to go directly from *St. Eustatius* to *London*, than to go back to *St. Kitt's* first. And as to the taking in the cargo at *St. Eustatius*, I do not find that the ship lost any time by it. Every thing is the effect of the storm, and occasioned by it. This is the only point on which I had any doubt, and it required some consideration. It was a question, which was proper to be left to a jury, whether this was the same voyage or not, and they have determined it."

Mr. Justice *Willes* inclined to a different opinion.—"My only doubt is, whether it was the same voyage as that insured. So far as the ship was driven by stress of weather, so far is there an exception. When she is driven to *St. Eustatius*, she attempts to get back to *St. Kitt's*; but I do not find that she made any attempt to get to *London* at that time. When she was at *St. Eustatius*, the owner of the ship sold her to *Ross*, who loaded her afresh with tobacco instead of sugar, which was to have been her original cargo; so that there is a new cargo, a new owner, and a new voyage. In these cases we lean very much to deviation. In a case lately determined in this court, it was held, that going to *Beaumaris*, though only a few leagues out of the way, was a deviation. It strikes me as a case of some difficulty: perhaps the jury had not evidence enough laid before them, on which to determine; for there is nothing said on the part of the defendant as to the usual course of the voyage. The risk was certainly increased by the ship's continuing at *St. Eustatius* so long: for the insurance, if good at all, was good all the time the
law

lay by at *St. Eustatius*; and she might have continued there much longer. In my opinion, it is very well worth the re-consideration of a jury." C H A P.
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Mr. Justice *Ashurst*.—"This ought to be considered as the same voyage insured. Wherever a ship is driven by stress of weather out of her own port into another, that shall not be considered as a deviation. Here the ship was forced by stress of weather to go to *St. Eustatius*; and being there, she endeavoured several times to get back to *St. Kitt's*, but without effect. In fact it was better for the parties that the cargo should be completed at *St. Eustatius*; her continuing there, rather diminishes the risk than otherwise; because if she had gone back to *St. Kitt's*, it would have taken up a longer time. If then every thing was done, that could be done, under such circumstances, for the benefit of the adventure, this shall not vacate the policy.

Mr. Justice *Buller*.—"It has been much relied on in this case, that there was a change of property; but that, in my opinion, makes no difference. Then laying that out of the question and supposing the ship as not being sold to *Ross*, I will first consider whether this is a different voyage. But that cannot be, as it would be contrary to the evidence: neither is it true, that the vessel afterwards pursued the same voyage by accident; for that part of the cargo, which she took in at *St. Kitt's*, continued on board of her the whole time, and the original intention of the ship's coming to *London* was likewise continued: the parties never thought of a different voyage. But it is said, that she took in another cargo at *St. Eustatius*: what says the evidence? Where a captain has not taken in a full cargo, it is usual to take in the rest at *St. Eustatius*: such was proved to be the custom of the voyage: and it was proved, that on a voluntary act of the captain's going to *St. Eustatius*, the policy would have protected the ship's stay there; *a fortiori* it will, when the ship was driven there by stress of weather. As to the defendant's not being prepared at the trial to answer the usage, he ought to have come prepared with that, which was the gift of his defence. Then was the risk altered? had it been so, it was in the defendant's power to have proved it; but there was no proof that it was altered; part of the same cargo continues; nor does it appear that they meant to alter the cargo, for she endeavoured to get

D H A P. back to *St. Kitt's* to take in the rest; but was prevented by storms. I think the risk would in reality have been much greater if she had gone back; for she must have come by the way of *St. Eustatius* again in her passage home. The part of her cargo, which was taken in at the time the ship was driven from *St. Kitt's*, has already been paid for by the defendant; even this would not have been paid for by the defendant, if he had conceived that the voyage had been at an end." The learned judges therefore, except Mr. Justice *Willes*, after giving their opinions upon the other points in the cause, ordered the rule for a new trial to be discharged.

Wolfe v.
Claggen,
3 Esp. 257.

But wherever the excuse of necessity is set up, whether as arising from the act of God, or from any other cause, it must satisfactorily appear that every proper precaution was previously used by the assured, and that there was no default on his part, otherwise the plea of necessity shall not be admitted. The case in which this doctrine was advanced, was tried before Lord Chancellor *Eldon*, when Chief Justice of the Court of Common Pleas. The insurance was from *Altona* to *Surinam*. The defence was deviation, the vessel having put into *Plymouth*, out of the course of the voyage, and remained there 14 days. The answer on the part of the plaintiff to this defence was: that the captain was taken ill with a severe fit of the gravel, and that the mate having pricked his finger, by accident, his hand and arm swelled to such a degree, as to render him incapable of doing his duty, and that they had put into *Plymouth* for the purpose of procuring medical assistance. These facts, as to the captain's and mate's illness, and their application to a surgeon, were proved: but it also appeared, on cross examination, that the surgeon of the ship was unprovided with proper instruments and medicines. He was not called.

Lord *Eldon* said, he was of opinion that if by the visitation of God so many of the crew, who would otherwise have been sufficient, became so afflicted with sickness, as to be incapable of navigating the ship, such an illness of the crew was a necessity which might justify a deviation: but when it was set up as a justification of a deviation, he thought it incumbent on the plaintiff to shew that he had so far provided against such events, by every proper precaution, such as having medicines

for

for the voyage, as much as he was bound with respect to the tightness of the ship. It was in evidence that a surgeon was necessary in such voyages: if therefore sickness was to be set up as an excuse for deviation, the plaintiff should shew that the surgeon was provided with such medicines and instruments as would probably become necessary in the course of the voyage, to meet the common casualties of the mariners. He was also of opinion, that the necessity for going into port ought to be made out by the plaintiff beyond all possibility of doubt, and that it arose and existed without any default of the master or party insuring: and if they came in for medical aid, he should expect medical men to be called to prove that such necessity existed. That had not been done in the case then before him, and the plaintiff must be nonsuited.

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A deviation may also be justified, if done to avoid an enemy, or seek for convoy; because it is in truth no deviation to go out of the course of a voyage, in order to avoid danger, or to obtain a protection against it.

In an action upon a policy, which was to insure the *William Galley* in a voyage from *Bremen* to the port of *London*, warranted to depart with convoy; the case was this, the *Galley* set sail from *Bremen*, under the convoy of a *Dutch* man of war to the *Elb*, where they were joined by two other *Dutch* men of war, and several *Dutch* and *English* merchant ships, whence they sailed to the *Texel*, where they found a squadron of *English* men of war and an admiral. After a stay of nine weeks, they set out from the *Texel*, and the *Galley* was separated in a storm, and taken by a *French* privateer, taken again by a *Dutch* privateer, and paid 80*l.* salvage.

Bond v.
Gonsales,
2 Saik 415

It was ruled by Lord Chief Justice *Holt*, that the voyage ought to be according to usage, and that their going to the *Elb*, though in fact out of the way, was no deviation; for till after the year 1703, there was no convoy for ships directly from *Bremen* to *London*. And the plaintiff had a verdict.

On an insurance from *London* to *Gibraltar*, warranted to depart with convoy; it appeared there was a convoy appointed for that trade at *Spithead*; and the ship *Ranger* having tried for convoy in the *Downs*, proceeded to *Spithead*, and was taken in

Gorton v.
Morley.
C. mabell v.
Bordieu,
2 Stra.
126*c.*

C H. A P. her way thither. The insurers insisted that this being the time
 XVII. of a *French* war, the ship should not have ventured through the
 Channel, but have waited in the *Downs* for an occasional con-
 voy. And many merchants and office-keepers were examined
 to that purpose.

But Lord Chief Justice *Lee* held that the ship was to be con-
 sidered as under the defendant's insurance to a place of general
 rendezvous, according to the interpretation of the words *war-
 ranted to depart with convoy*. And if the parties meant to vary
 the insurance from what is commonly understood, they should
 have particularized her departure with convoy from the *Downs*.
 The juries were composed of merchants ; and in both cases they
 found for the plaintiffs upon the strength of this direction.

Cowp. Rep. In the case of *Bond* against *Nutt*, in which the material ques-
 601. tion was, whether a warranty had or had not been complied
 with, and which consequently will be fully stated in the follow-
 ing chapter, the point of deviation for the purpose of procuring
 convoy also came under the consideration of the court. Upon
 that occasion Lord *Mansfield* and the whole court held, that if a
 ship go to the usual place of rendezvous, for the sake of joining
 convoy there ready, though such place be out of the direct course
 of the voyage, it is no deviation.

Enderby
 and an-
 other v.
Fleche,
 Sittings in
 Lond. Trin.
 Vac. 1780.

And in a more modern case, the only question was, Whether
 there was a deviation or not ? Lord *Mansfield* there directed the
 jury to find for the plaintiffs, if they believed that the captain
 fairly and *bonâ fide* acted according to the best of his judgment :
 that he had no other view or motive but to come the safest way
 home, and to meet with convoy ; for that it was no deviation to
 go out of the way to avoid danger.

In our law books we sometimes meet with cases, which say,
 that a deviation may be justified by the usage and custom of the
 trade. But that is not quite correct ; for if by the usage of any
 particular trade, it is customary to stop at certain places, lying
 out of the direct course from *A.* to *B.* it is not a deviation to stop
 there ; because it is a part of the voyage. There is no deception
 upon the insurer ; because he is bound to take notice of the
 usages of trade ; they are notorious to all the world ; and when
 the

the usage has declared it lawful in a specifick voyage to go to any place, though out of the immediate track, it is as much a part of the contract of insurance between the parties, as if it had been particularly mentioned. But in order to justify the captain of a ship in quitting the straight and direct line from the port of loading to that of delivery, there must be a precise, clear, and established usage upon the subject, not depending merely upon one or two loose and vague instances.

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Where a ship was insured from *Liverpool* to *Jamaica*, and had put into the *Isle of Man*; it appeared that there were *some instances* of the *Liverpool* ships putting in there, but it was not the settled, common, established, and direct usage of the voyage and trade: it was therefore held a deviation, and the underwriters were discharged from any loss that happened subsequent to the deviation.

Salisbury v.
Townson.

Having thus mentioned all the cases to be found in the books of reports, which operate as an excuse for a departure from the due course of the voyage, and which prevent those effects, which always follow a deviation, namely, the discharge of the insurer from his contract; it will be proper to observe, that it is not meant to insinuate that other circumstances may not frequently happen, which will have precisely the same consequences. For wherever a ship does that which is for the general benefit of all parties concerned, the act is as much within the intention and spirit of the policy, and consequently as much protected by it, as if expressed in terms. And therefore in all cases, in order to determine whether a diversion from the direct course of the voyage is such a deviation as in law vacates the policy, it will be proper to attend to the motives, end, and consequences of the act, as the true criterion of judgment.

Cowper 601.

If any of the circumstances above stated do really and *bona fide* occur, so as to render a deviation absolutely necessary, the ship must pursue such *voyage of necessity* in the direct course, and in the shortest time possible, otherwise the underwriters will be discharged. Because a voyage superadded by necessity, ought to be subject to the same qualifications, and entitled only to the same sort of latitude as the original voyage, it having become by operation of law, a part, as it were, of that original voyage.

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LAVABIE v.

Walter,

Dougl. 284.

This was laid down as law by the Court of King's Bench in a case, in which the voyage insured was described in these words: "At and from *Port L'Orient* to *Pondicherry*, *Madras*, "and *China*, and at and from thence back to the ship's port, or "ports of discharge in *France*, with liberty to touch, in the out- "ward or homeward-bound voyage, at the isles of *France* and " *Bourbon*, and at all or any other ports or places, what or "wheresoever: and it shall be lawful for the said ship, in this "voyage to proceed and to sail to, and touch and stay at any ports "or places whatsoever, as well on this side, as on the other side, "the *Cape of Good Hope*, without being deemed a deviation." The ship did not sail till the 6th of *December* 1776, and did not reach *Pondicherry* till the 23d of *July* 1777. She continued there till the 23d of *August* following, when, instead of proceeding to *China*, she sailed for *Bengal*, where having passed the winter, and undergone very considerable repairs, she sailed from thence early in the year 1778 (being the second ship that left the *Ganges*), returned to *Pondicherry*; and, after taking in a homeward-bound cargo at that place, proceeded in her voyage back to *L'Orient*, but was taken in *October* in that year by the *Mentor* privateer. The usual time in which the direct voyage between *Pondicherry* and *Bengal* is performed, is six or seven days, but the *Carnatic* was about six weeks in going to *Bengal*, and two months on the way back from thence to *Pondicherry*. Both going and returning, she either touched at, or lay off, *Madras*, *Masilipatam*, *Visigapatam*, and *Yanon*, and took in goods at all those places. The plaintiffs rested their case chiefly on this ground, that the voyage to *Bengal* was adopted by necessity for the safety of the ship, upon the *bonâ fide* opinion of the captain, and the rest of the officers, and of one *Berard* the supercargo, who had the principal management. To prove this necessity it was sworn by *Berard* and four mates, that the ship had been detained longer in *Europe* than at first was foreseen, and that she met with extremely bad weather on her outward passage; and at *Pondicherry* was so leaky, that it appeared to them, that she must be careened, which could only be done at *Bengal*, there being no other place so near, to which she could proceed with safety, where that operation could be performed; for that no harbour between *Pondicherry* and the *Ganges* on the one side, and *Pondicherry* and *Bombay* on the other, would admit of so large a vessel being hove down, her burthen being near 800 tons. Indeed it turned out

when they got to *Bengal*, that she could be repaired without ca-
 reening, but this was only discovered, they said, after she was
 unloaded of much more of her contents than could have been
 done with safety in the open road of *Pondicherry*. All the wit-
 nesses for the plaintiffs swore that they took the resolution of
 going to *Bengal* much against their inclination; for that it would
 have been not only more for the advantage of the owners, but
 also more for their private interest as individuals, to go to *China*,
 they having prepared their own adventures for that market.
 Besides the circumstances of the leak, they assigned an additional
 reason for relinquishing the voyage to *China*, viz. that they had
 been so long detained at *Pondicherry*, from delays in unloading
 their outward-bound cargo, that they were not ready to leave
 that place, till it was too late to undertake the *China* voyage with
 any degree of prudence or safety; and they said *Bengal* was the
 best place they could go to, in order to winter. The defence
 set up was; 1st, That the ship had never failed on the voyage
 insured, her destination, *when she left Europe*, having been for
Bengal, and not for *China*. 2d, That supposing her to have
 failed on the voyage described in the policy, yet her going from
Pondicherry to *Bengal*, instead of proceeding to *China*, was a de-
 viation, and was not justified by necessity. In support of the
 first ground of defence, certain secret instructions were relied
 upon which were found on board the ship, and were addressed by
 the owner at *L'Orient* to *Berard* the supercargo, and which,
 though obscurely penned, gave great room to contend, either
 that, at her departure, it had been resolved to substitute the
Bengal for the *China* voyage, or, at least, that the alternative
 was left with *Berard*, to be decided one way or the other, ac-
 cording to certain events in *India*, which events turned out in
 the sort of way that, according to the instructions, was to de-
 termine the voyage for *Bengal*. On the second ground, it was
 said, that from the plaintiff's own witnesses, there was no ne-
 cessity for going to *Bengal*; and that instead of going directly
 thither, a trading voyage had been made from *Pondicherry*, which
 afforded a strong presumption that trading, and not the leak, or
 lateness of the season, was the object of going to *Bengal*. On
 the part of the defence also, several letters were read (written
 by the owners to their correspondents who had got their policy
 underwritten) to raise a presumption that the necessity of going

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Vide ante,
c. 2.

when the insured began to apprehend that the words of the policy would not cover a voyage to that place. This is the substance of the evidence given in this, and two other causes upon the same ship, though not on the same policy: in addition to which in the present case, the secret instructions given to *Berard* had been more attentively perused, and afforded stronger reasons than they at first seemed to do, that the voyage to *Bengal* was pre-determined before the departure from *L'Orient*. The plaintiff's witnesses were much pressed, on this occasion, to say whether the lateness of the season alone was such as, independent of the leak, would have determined them to abandon the *China* voyage; and on the other hand, whether the leak, independent of the other reason, would, in their opinion, have rendered it necessary so to do. To this they said, they could not give a certain answer; for that as neither of the cases had happened, they had not exercised their judgment upon them.

Lord *Mansfield* summed up very strongly against the plaintiffs, on the head of fraud. But, independent of that ground, he stated a new point against them, namely, that if necessity were admitted to have been the sole motive for substituting the voyage to *Bengal* in the place of that of *China*, still it was incumbent on the insured to have pursued that voyage of necessity directly, in the shortest and most expeditious manner: and that the delay in going from *Pondicherry* to *Bengal*, and the repeated stops by touching at different places, and trading there, were deviations, and not within the protection which the supposed necessity afforded to the direct voyage.

Notwithstanding this direction, the jury found a verdict for the plaintiffs. Upon a motion for a new trial, after argument at the bar, the opinion of the Court of King's Bench was delivered by

Lord *Mansfield*.—"If this application were made upon the ground of impeaching the testimony of the plaintiff's witnesses, whatever my private sentiments might be, after two concurrent verdicts, I should not be inclined to interpose. But, without impeaching the evidence, I think there ought to be a new trial, or rather, that the case has been ill decided. The question is, without imputation on any body, circumstances have

not happened to take the voyage out of the policy ? A deviation from necessity must be justified, both as to substance and manner. *Nothing more must be done than what the necessity requires.* The true objection to a deviation is not the increase of the risk. If that were so, it would only be necessary to give an additional premium. It is, that the party contracting has voluntarily substituted another voyage for that which has been insured. If the voyage to *Bengal* was unavoidable, where was the necessity to trade ? All the ports touched at were out of the direct course ; and six weeks and two months were consumed, instead of six days. The justice of the case required a different decision." The rule for a new trial was accordingly made absolute. The cause was again set down for trial ; but the plaintiffs, when they were ready to be called on, submitted to the opinion of the court, and abandoned their claim against the underwriters.

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So also if a ship be insured upon a trading voyage, it is incumbent on the parties assured, to carry on that trade with usual and reasonable expedition, otherwise their conduct will amount to a deviation, and discharge the policy.

Thus in an action by the assured against an underwriter on a policy of insurance on the ship *Blossom*, at and from the coast of *Africa* to the *West Indies*, with liberty to exchange goods and slaves ; a verdict was given for the plaintiff. But upon a rule being obtained to shew cause why there should not be a new trial, it appeared that there had been a great deal of contradictory evidence, and many points started at the trial ; but the question now made was, Whether the plaintiff, by the use he made of the vessel on the coast of *Africa*, and the delay he there occasioned, was not the cause of the loss ; that is, whether he did not make such use of her during her stay on the coast, contrary to the design of the policy, as amounted to a deviation ?

Hartley v.
Buggin,
B. R. Mich.
22 Geo. III.

It appeared in evidence, that this ship stayed on the coast from *August* to *March* ; that she was employed in receiving slaves on board, the produce of the cargoes of other ships, which were afterwards put on board other ships, and sent to the *West Indies* ; that this is the employment of what they call a *factory ship* ; but that a regular factory ship is thatched and covered, and receives the slaves till a sufficient number is collected to send away

C H A P. vessels; but it did not appear that any slaves, the produce of the
 XVII. *Blossom's* own cargo, were sent away in other vessels, but that her
 stay there was several months beyond the usual stay of ships in
 that trade. After argument at the bar,

Lord *Mansfield* said, "When different points are agitated at a trial, and a great deal of evidence applied to each, and the counsel go out of the cause, it is not to be wondered at, if juries should lose their attention to the material point. The great advantage of a motion for a new trial is, that after argument on the motion, the cause goes down again winnowed from the chaff of the first trial. The single point here is, Whether there has not been what is equivalent to a deviation, whether the risk has not been varied? it is not material whether or not the risk has been greater. If a ship insured for a trade, is turned into a floating warehouse, or a factory ship, the risk is different, it varies the stay, for while she is used as a warehouse, no cargo is bought for her. The law being clear, how is the fact? The captain says she was not used as a factory ship, his evidence is much impeached; but he says he was young in the trade; he never saw a factory ship but once, and was not in her; he might have a salvo, because this was not thatched; but was she used as a thatched ship is used? It is said that letters are not records; 'tis true they may be contradicted; but if they are from the parties, and are not contradicted, they are as strong as any records. The fact is clear, the risk is different in point of length, &c." Rule absolute for new trial.

Arkinson
 v. Collier,
 sitting in
 C. B. after
 Mich. 1797.

So in an action on a policy from *London* to *Port Endick*, on the coast of *Africa*, at six guineas *per cent.* on the ship till moored at anchor 24 hours, and on goods till discharged and safely landed. The ship arrived on the coast on the 6th of *May*, and was captured by the *French* on the 4th of *June*. The barter in the trade is carried on, on board the vessel, and the goods afterwards sent on shore, in boats, and the gums brought back. In this case, the discharge of the cargo had not begun, the gums not having been brought down to the coast, for which purpose it is necessary to have a previous agreement with the king of the country; but no delay had been used. The counsel for the defendant contended, that by the custom of this trade, the risk on the goods,

if on the ship expired in 24 hours, and that the risk on

the cargo, while on the coast, was protected by the homeward policy, at 15 guineas *per cent.*—Lord *Kenyon* refused the evidence, both of the homeward policy, and of this supposed usage (which he had on a former occasion admitted against his own opinion, and on which a new trial had been granted), to qualify the clear and unequivocal language of the policy, which covered the risk, *till the goods were landed.* That if, in landing, any unnecessary delay had been used, that might amount to something in the nature of a deviation, so as to discharge the insurer; but that did not appear to be the case in the present instance.

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But though an actual deviation from the voyage insured is thus fatal to the contract of insurance; yet a deviation merely intended, but never carried into effect, is considered as no deviation, and the insurer continues liable. This has been frequently so decided. Thus in the case of an insurance from *Carolina* to *Lisbon*, and at and from thence to *Bristol*; it appeared, that the captain had taken in salt, which he was to deliver at *Falmouth* before he went to *Bristol*; but the ship was taken in the direct road to both, and before she came to the point, where she would have turned off to *Falmouth*. It was held, that the insurer was liable; for it is but *an intention to deviate*, and that was held not sufficient to discharge the underwriter.

Foster v.
Wilmer,
2 Stra. 1249.

Lord Chief
Justice Lee.

In the case of *Carter v. the Royal Exchange Assurance Company*, where the insurance was from *Honduras* to *London*, and a consignment to *Amsterdam*: a loss happened before she came to the dividing point between the two voyages, for which the insurers were held liable to pay.

2 Stra. 1249.

The doctrine laid down in these cases has since been frequently recognized in subsequent decisions, and particularly by Lord *Mansfield* in the case of *Thellusson v. Fergusson*, which will be fully reported in the next chapter. The insurance was from *Guadeloupe* to *Havre*, and by the depositions it appeared that the ship sailed for *Havre*, and was always intended for *Havre*; but was directed to keep in the course of *Brest* for safety. One of the grounds of defence was, that the ship never sailed from *Guadeloupe* to *Havre*, but on a voyage from *Guadeloupe* to *Brest*. Lord *Mansfield*, in answer, said, "the voyage to *Brest* was, at most, but an intended deviation. not carried into effect."

Doug. 361.

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If, however, it can be made appear by evidence, that it never was intended nor came within the contemplation of the parties to sail upon the voyage insured ; if all the ship's papers and documents be made out for a different place from that described in the policy, the insurer is discharged from all degree of responsibility, even though the loss should happen before the dividing point of the two voyages. This distinction was very properly taken by the court of King's Bench, in a modern case : and by that distinction they admitted the general doctrine, with respect to the intention to deviate, in its fullest extent.

Wooldridge
v. Boydell,
Doug. 16.

The ship *Molly*, being insured "at and from *Maryland* to *Cadiz*," was taken in *Chesapeake Bay*, in the way to *Europe*. Upon this the insured brought this action against the defendant, one of the underwriters on the policy. The trial came on at *Guildhall* before Lord *Mansfield*, when a verdict was found for the defendant. A new trial being moved for, the material facts of the case appear to be as follows:—The ship was cleared from *Maryland* to *Falmouth*, and a bond given that all the enumerated goods should be landed in *Britain*, and all the other goods in the *British* dominions. An affidavit of the owner stated that the vessel was bound for *Falmouth*. The bills of lading were, "To *Falmouth* and a market;" and there was no evidence whatever that she was destined for *Cadiz*. The place where she was taken was in the course from *Maryland* both to *Cadiz* and *Falmouth*, before the dividing point. Many circumstances led to a suspicion that she was, in truth, neither desigued for *Falmouth* nor *Cadiz*, but for the port of *Boston*, to supply the *American* army ; but there was not sufficient direct evidence of that fact.—At the trial, Lord *Mansfield* told the jury, that if they thought the voyage intended was to *Cadiz*, they must find for the plaintiff. If on the contrary, they should think there was no design of going to *Cadiz*, they must find for the defendant. It also appeared in evidence, that the premium to insure a voyage from *Maryland* to *Falmouth*, and from thence to *Cadiz*, would have greatly exceeded what was paid in this case. Upon the motion for a new trial being argued, the counsel for the plaintiff cited the two cases above stated from *Strange's Reports*,

Lord *Mansfield*.—"The policy, on the face of it, is from *land* to *Cadiz*, and therefore purports to be a direct voyage

to *Cadiz*. All contracts of insurance must be founded on truth, and the policies framed accordingly. When the insured intends a deviation from the direct voyage, it is always provided for, and the indemnification adapted to it. There never was a man so foolish as to intend a deviation from the voyage described, when the insurance is made, because that would be paying without an indemnification. Deviations from the voyage insured arise from after thoughts, after-interest, after-temptation; and the party, who actually deviates from the voyage described, means to give up his policy. But a deviation merely intended, but never carried into effect, is as no deviation. In all the cases of that sort, the *terminus a quo* and *ad quem*, were certain and the same. Here, Was the voyage ever intended for *Cadiz*? There is not sufficient evidence of the design to go to *Boston*, for the court to go upon. But some of the papers say to *Falmouth* and a market: some to *Falmouth* only. None mention *Cadiz*, nor was there any person in the ship, who ever heard of any intention to go to that port. A *market* is not synonymous to *Cadiz*: that expression might have meant *Naples*, *Leghorn*, or *England*. No man, upon the instructions, would have thought of getting the policy filled up to *Cadiz*. In short, that was never the voyage intended, and consequently is not what the underwriters meant to insure."

Mr. Justice *Buller*.—"I am of the same opinion. I believe the law to be according to the authorities mentioned on the part of the plaintiff: but it does not apply here. This is a question of fact. There cannot be a deviation from that, which never existed. The weight of the evidence is, that the voyage was never designed for *Cadiz*."

Mr. Justice *Willes* and Mr. Justice *Abbott* concurring in the opinion delivered by Lord *Mansfield* and Mr. Justice *Buller*, the rule for a new trial was discharged.

In a still later case the same doctrine was advanced; namely, that if a ship be insured from a day certain from *A.* to *B.*, and before the day fall on a different voyage from that insured, the assured cannot recover; even though the ship afterwards fall into the course of the voyage insured, and be lost after the day at which the policy was to have attached.

Way v. Mo-
digliani,
2 Ta-
30.

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Kewley v.
Ryan, 2 H.
Black. Rep.
p. 343. See
ante, p. 22.

Since the second edition of this work was published, the cases *Wooldridge v. Boydell*, and *Way v. Modigliani*, have again come under discussion in the court of Common Pleas; and it has been held by the four judges of that court, one of whom sat in the court of King's Bench when the two cases just reported were decided, that where the *termini* of the intended voyage continue the same as those described in the policy, an intention to go to an intermediate port, though that intention should be formed previous to the ship's sailing, will not vitiate the insurance till actual deviation. The case has already been quoted for another purpose; and the facts as to this point are shortly these. The insurance was *at and from Grenada to Liverpool*; the ship sailed from Grenada, bound for Liverpool, but with a design formed before the commencement of the voyage, as appeared by the clearances, and was admitted on all sides, to touch at Cork, in her way to Liverpool, but was totally lost before she arrived at the dividing point. In the course of the argument a case of *Stott v. Vaughan*, was mentioned, as having been tried before Lord Kenyon, at the sittings at Guildhall, after Hilary Term 1794, in which his Lordship nonsuited the plaintiff, in an action on a policy on this very ship, being of opinion that the case fell within those of *Wooldridge v. Boydell*, and *Way v. Modigliani*, and that there was no inception of the voyage insured. The court of Common Pleas, however, having taken time to deliberate upon this case of *Kewley v. Ryan*, delivered their opinion as to the 3d question, that where the *termini* of the intended voyage were really the same as those described in the policy, it was to be considered as the same voyage, and a design to deviate, not effected, would not vitiate the policy. That in *Wooldridge v. Boydell*, it appeared there was no intention that the ship should go to Cadiz at all, which was mentioned in the policy as her port of delivery; and in *Way v. Modigliani* there was an actual deviation, by the ship going to fish on the banks of Newfoundland: those cases therefore were wholly different from the present, for here the ship was really bound to Liverpool, though there were also clearances for Cork (a).

(a) See the case of *Middlewood v. Blaken*, 7 Term Rep. 162. where the several cases immediately preceeing on the distinction between deviations intended, but not carried into effect, and non-inception of the voyage insured, are much considered.

From the proposition just established, namely, that a mere intention to deviate will not vacate the policy, it follows as an immediate consequence, that whatever damage is sustained before actual deviation, will fall upon the underwriters.

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Thus it was held by Lord Chief Justice *Holt*, who said, that if a policy of insurance be made to begin from the departure of the ship from *England* until; &c. and after the departure a damage happens, &c. and then the ship *deviates*; though the policy is discharged from the time of the deviation, yet for the damages sustained before the deviation, the insurers shall make satisfaction to the insured.

Green v.
Young,
2 Ld. Raym.
840. 2 Salk.
444. S. C.

Subject to the rules already advanced, deviation or not is a question of fact, to be decided according to the circumstances of the case.

Dougl. 787.

In cases of deviation, the premium is not to be returned; because the risk being commenced, the underwriter is entitled to retain it.

Vide post.
c. 19.

In the case of *Hogg v. Horner*, above quoted, Lord *Kenyon* being of opinion that the ship had deviated, it was insisted for the plaintiff, that as the intention to go to *Faro* (the going to which place was the deviation relied on by the defendant) had existed prior to the sailing, it was a non-inception of the voyage insured, and he had a right to the return of premium. Lord *Kenyon*, however, was of opinion that there was an inception of the risk *at*, and the contract was entire, consequently there could be no return of premium. But of this, more will be said in a subsequent chapter.

Vide ante,
p. 394.

CHAPTER THE EIGHTEENTH.

Of Non-Compliance with Warranties.

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XVIII.1 Term Rep.
p. 345.Chap. 16,
27.

IN the two preceding chapters we have seen the effect, which the non-observance of implied conditions has upon the contract of insurance; we shall now proceed to consider the nature of warranties; their various kinds; and how far they must be complied with on the part of the insured, in order to render the contract binding between the parties. A warranty in a policy of insurance is a condition or a contingency, that a certain thing shall be done or happen, and unless that is performed, there is no valid contract. It is perfectly immaterial for what view the warranty is introduced; or whether the party had any view at all: but being once inserted, it becomes a binding condition on the insured: and unless he can shew that he has literally fulfilled it, or that it was performed, the contract is the same, as if it had never existed. We have already seen that the breach of an implied condition is sufficient to avoid the policy; *a fortiori*, therefore, the effect must be the same, where the condition is express, and not liable to misrepresentation or error, because it makes a part of the written contract. To say that the underwriter should answer for a loss, notwithstanding the other party has failed in his engagements, would be to make a different rule in this species of contract, from that which subsists in every other; although this of all other contracts depends most upon the strictest attention to the purest rules of equity and good faith. Indeed the obligation to a strict performance of all promises and conditions in every species of contract, may be deduced, as has been truly observed by an elegant moral writer, from the necessity of such a conduct to the well-being, or the existence of human society.

We have said that a warranty must be strictly and *literally* performed; and therefore whether the thing, warranted to be done, is essential to the security of the ship; or whether the

loss do or do not happen, on account of the breach of the warranty, still the insured has no remedy; because he himself has not performed his part of the contract, and if he did not mean to perform, he ought not to have bound himself by such a condition. And though the condition broken be not, perhaps, a material one, yet the justice of the law is evident from this consideration: that it is absolutely necessary to have one rule of decision; and that it is much better to say, that warranties shall in all cases be strictly complied with, than to leave it in the breast of a judge or jury to say, that, in one case it shall, and another it shall not. The very meaning of a warranty is to preclude all enquiries into the materiality, or the *substantial* performance of it: and although sometimes partial inconveniences may arise from such a rule; yet upon the whole, it will certainly produce public salutary effects. The insured is bound not to draw the underwriter into error, by false declarations respecting those things, about which the contract is made. *Debet prestare rem ita esse ut affirmavit.*

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XVIII.1 Term
Rep. p. 346.Pothier Tr.
du Contrat
d'Assu-
rance,
p. 197.

But as a warranty must be strictly complied with in favour of the underwriter, and against the insured, equal justice demands, and the true meaning of the contract of insurance requires, that if a strict and literal compliance with the warranty will support the demand of the insured, the decision ought to be in his favour, especially when by such a decision all the words in the policy will have their full operation.

In an action on a policy on goods, dated 9th December 1784, *lost or not lost, warranted well this 9th day of December 1784*; it appeared, that the warranty was at the foot of the policy; that the policy was underwritten between the hours of one and three in the afternoon of the 9th December; that the ship was well at six o'clock in the morning, but was lost at eight o'clock the same morning.

Blackburn
v. Cockell,
1 Term
Rep. 360.

Upon a motion to set aside a nonsuit, which had been entered, Lord Kenyon Chief Justice, *Abbott, Buller, and Grose*, Justices, were clearly of opinion, that the warranty was sufficiently complied with, if the ship were well at any time that day; that the nature of a warranty goes to determine the question; for as it is a matter of indifference whether the thing warranted be, or be not material, and yet must be literally complied with: still

C H A P. XVIII. it be complied with, that is enough : that there was good reason for inserting these words, because they protected the underwriter from losses before that day, to which he would otherwise have been liable, as the policy was on the goods from the lading ; and thus too, the words *lost or not lost* have also their operation.

Cowp. 607. This being the case, it follows as a necessary consequence, that it is very immaterial to what cause the non-compliance is to be attributed ; for if the fact be, that the warranty was not complied with, though perhaps for the best reasons, the policy has no effect. The contingency has not happened ; and therefore the party interested has a right to say, that there is no contract between them. Upon this account it is, that if a ship be warranted to sail on or before the 1st of *August*, and she be prevented by any accident from sailing till the 2d of *August*, as by the sudden want of any necessary repair, or by the appearance of an enemy at the mouth of the port, the captain would do right not to sail : but there would be an end of the policy.

In this strict and literal compliance with the terms of a warranty consists the difference between a warranty and a representation.

Vide ante,
c. 10.

Pawson v.
Watson,
Cowp. 787.

Of this distinction something was said in a preceding chapter : it is sufficient now to observe, that a warranty, as part of the agreement, and a condition on which it was made, must be *strictly* complied with, whereas a representation need only be performed *in substance*. In a warranty, the person making it takes the risk of its truth or falsehood upon himself : in a representation, if the insured assert that to be true, which he either knows to be false, or about which he knows nothing, the policy is void on account of fraud. But a representation, made without fraud, if not false in a *material* point, or if it be *substantially*, though not *literally* fulfilled, does not vitiate the policy.

all the
Judges, in
the case of
v.

But as representations were very often made in writing, by way of instructions for effecting a policy, it became necessary to specify, what written declarations should be deemed warranties, and what representations. It was, therefore, by several decisions of the courts, held to be law, that *in order to make written instructions valid and binding as a warranty, they must appear on the face of the instrument itself, by which the contract of insurance is effected.*

This was declared by Lord *Mansfield* in a very particular manner in answer to a question put to him by Mr. *Davenport* at the desire of the underwriters, after he had delivered the opinion of the court upon a question on a representation.

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Pawson v.
Watson,
Comp. 790.

Even though a written paper be *wrapped up in the policy*, when it is brought to the underwriters to subscribe, and shewn to them at that time; or even though it be *wafered to the policy*, at the time of subscribing; still it is not in either case a warranty, or to be considered as part of the policy itself, but only as a representation. Both these instances have occurred in causes before Lord *Mansfield*.

In an action on a policy of insurance, the counsel for the defendant offered to produce witnesses to prove, that a written memorandum inclosed was always considered as part of the policy. But Lord *Mansfield* said, it was a mere question of law, and would not hear the evidence; but decided that a written paper did not become a strict warranty, by being folded up in the policy.

Pawson v.
Barnevelt,
at Guild-
hall, Trin.
Vacat.
1779.
Doug. p.
12. in the
notes.

In the other case it appeared, that at the time when the insurers underwrote the policy, a slip of paper was wafered to it, describing the state of the ship as to repairs and strength, and also mentioning several particulars of her intended voyage, which particulars in the event had not been complied with. Lord *Mansfield* ruled, that this was only a representation; and if the jury should think there was no fraud intended, and that the variance between the intended voyage, as described in the slip of paper, and the actual voyage as performed, did not tend to increase the risk of the underwriters, he directed them to find for the plaintiff, which they accordingly did. This verdict was afterwards set aside upon another ground (a).

Pize v.
Fletcher, at
Guildhall
Eas. Vacat.
1779.
Doug. p.
12.
in the notes.

It being thus settled, that a warranty must appear on the face of the instrument, it still became a question, whether a warranty, written in the margin of the policy, was to be considered equally binding, and subject to the same strict rule of construction, as if inserted in the body of the policy itself. This point came un-

(a) But if a policy of insurance refer to certain printed proposals, the proposals will be considered as part of the policy. *Worsley v. Wood*, in error, 6 Term Rep., also *see* *Worsley v. Wood*, H. Black 334.

C H A P. der the consideration of the court in the case of *Bean and Stupart*
 XVIII in which the material question was, Whether, supposing it to be
 a warranty, *boys* were included under the word *seamen*? That
 case, as far as it is material to our present enquiry, was as
 follows:

Bean v.
Stupart
Doug. 11.

The plaintiff insured the ship called the *Martha*, at and from
London to New York; the voyage to commence from a day spe-
 cified; and in the *margin* of the policy were written these
 words, "Eight nine pounders with close quarters, six six poun-
 ders on her upper decks; thirty seamen besides passengers."

Upon a motion for a new trial in this case, Lord *Mansfield*
 said, there is no doubt but this is a warranty. Its being written
 on the margin makes no difference. Being a warranty, there is
 no doubt but that the underwriters would not be liable if it
 were not complied with; because it is a condition on which the
 contract is founded.

Kenyon v.
Perithon,
Mich. Vac.
1779.
Doug. p. 12.
note (4.)

In an action on a policy of insurance, it appeared that the
 following words were written transversely on the margin of the
 policy: "In port 20th *July*, 1776." In fact, the ship had
 sailed the 18th of *July*. The question was, Whether this mar-
 ginal note was a warranty or a representation?

Lord *Mansfield*.—"The question is, Whether the ship's be-
 ing in port on the 20th is part of the condition of the instru-
 ment? When it is on the face of the instrument, it is a part
 of the policy; so that here, if the ship was not in port, it is no
 contract. As to its being only in the margin, that makes no
 difference: it is all part of the contract when it is *once* signed.
 And though the difference of two days may not make any ma-
 terial difference in the risk, yet as the condition has not been
 complied with, the underwriter is not liable."

The propriety of these decisions has never been questioned,
 and the rule has been constantly and tacitly acquiesced in from
 the time in which these cases were determined till the year
 1786, when, notwithstanding the uniformity of the determina-
 tions, it once more became an object of dis-

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De Hahn
v. Hartley
1 Term
Reg. p. 341.

It came before the court upon a special verdict : it was an action of assumpsit brought by the plaintiff (an underwriter) against the defendant, to recover back the amount of a loss which he had paid upon a policy of insurance. The defendant pleaded the general issue. The cause came on to be tried before Mr. Justice *Buller*, at *Guildhall*, when the jury found a special verdict, stating :

That the defendant on the 14th of *June* 1779, gave to his insurance broker instructions in writing, to cause an insurance to be made on a certain vessel, called the *Juno*. (Then the instructions are set out in the verdict, signed by the defendant.) The verdict then states that the broker, in consequence of such instructions, on the said 14th of *June* 1779, did cause a policy of insurance to be made on the *Juno*, upon goods and merchandizes laden on board, and also on the ship, at and from *Africa*, to her port or ports of discharge in the *British West Indies*, at and after the rate of 15*l. per cent.* The verdict, after reciting two memorandums, not material, then proceeded to state, that in the margin of the said policy were written the words and figures following : " Sailed from *Liverpool* with 14 six-pounders, swivels, " small arms, and 50 hands or upwards ; copper sheathed ; " That the plaintiff underwrote the policy for 200*l.* at a premium of 3*l.* 10*s.* That the *Juno* sailed from *Liverpool* on the 13th of *October* 1778, having then only 46 hands on board her, and arrived at *Beaumaris*, in the *Isle of Anglesea*, in six hours after her sailing from *Liverpool*, with the pilot from *Liverpool* on board her, who did pilot her to *Beaumaris*, on her said voyage ; and that at *Beaumaris* the *Juno* took in six hands more, and then had, and during the said voyage, until the capture thereof, continued to have 52 hands on board her. That the said ship in the voyage from *Liverpool* to *Beaumaris*, until and when she took in the said six additional hands, was equally safe, as if she had had 50 hands on board her for that part of the voyage. The verdict then states, that the defendant was interested, and that the ship was captured : that on receiving an account of the loss of the vessel, the plaintiff paid to the defendant the sum of 200*l.* not having then had any notice that the said ship had only 46 hands on board her when she sailed from *Liverpool*.

For the defendant it was said, that this representation had no relation to the voyage insured ; for that was at and from *Africa*.

C H A P. &c. whereas this is merely an account of the state of the ship
 XVIII. at *Liverpool*.

Lord *Mansfield*.—"There is a material distinction between a warranty and a representation. A representation may be *equitably* and *substantially* answered; but a warranty must be *strictly* complied with. Supposing a warranty to fail on the 1st of *August*, and the ship did not fail till the 2d, the warranty would not be complied with. A warranty in a policy of assurance, is a condition or a contingency, and unless that is performed there is no contract. It is perfectly immaterial, for what purpose a warranty is introduced; but being inserted, the contract does not exist unless it is literally complied with. Now in the present case, the condition was, the sailing of the ship with a certain number of men, which not being complied with, the policy is of no effect."

Mr. Justice *Abbott*.—"The very meaning of a warranty is to preclude all questions whether it has *been* *substantially* complied with: it must be *literally* so."

Mr. Justice *Buller*.—"It is impossible to divide the words written in the margin, in the manner which has been attempted at the bar; that that part which relates to the copper sheathing should be a warranty, and not the remaining part. But the whole forms one entire contract, and must be complied with throughout." Judgment for the plaintiff. A writ of error was brought in the Exchequer-chamber upon this judgment, which, after two arguments, was affirmed by the unanimous opinion of the eight judges, composing that court. *Michaelmas Term 1787, 28 Geo. 3.*

Having stated those rules, which apply to warranties in general, it will now be proper to consider the several kinds of warranties, and those principles which are peculiar to each species, confirmed by decisions of the courts. It would be endless to enumerate the various warranties that are to be found in policies; because they must frequently, and for the most part do depend upon the particular circumstances of each case; such as the number of men, of guns, being copper sheathed, &c.

But

But those which most frequently occur in our books of reports, and upon which the greatest questions have arisen, may be reduced into three classes: Warranty as to the time of sailing; warranty of convoy; and warranty of neutrality. Of each of these we will treat: observing in the first place, that those rules which are applicable to warranty in general, must necessarily also apply to each of these individually.

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As to the time of sailing. In most voyages, the time at which they are to commence is a material circumstance; because in every country there are some seasons when navigation is much more dangerous than at others, owing to periodical winds, monsoons and various other causes. Indeed, we have seen, that a man having once warranted to sail on a particular day, whether the risk be, in fact, materially altered or not by a breach of that warranty, the underwriter is no longer answerable. But this strict adherence to the very day specified, must have arisen from the principles just stated: for if a latitude of one day were given, why not extend it farther? It has therefore been held, that when a ship has been warranted to sail on a particular day, though the ship be delayed for the best and wisest reasons, or even though she be detained by force; the warranty has not been complied with, and the insurer is discharged from his contract.

Roccus,
Not. 38.

Kenny v.
Bertin,
supra.

Thus in an action on a policy of insurance, upon a motion to set aside the verdict which had been given for the plaintiff, the case appeared to be this. The declaration stated, that a policy was made on the ship *New Westmorland*, at and from *Jamaica* to *London*, warranted to sail on or before the 26th of July 1776, free from capture, and free from all restraints and detentions of kings, princes, and people of what nation, condition, or quality soever. It further stated, that the said ship was prepared and ready to sail, and would have sailed on the 25th of July, on her intended voyage, if she had not been restrained by the order and command of *Sir Basil Keith*, the then governor of *Jamaica*, and detained beyond the day; that she afterwards sailed and was captured. For the plaintiff it was said, that the usual clause against the detention of rulers and princes being inserted in this policy, the embargo, by which the ship was detained from sailing on the day mentioned, was

Hore v
Whitmore,
Co 7846

C H A P. XVIII. ranty, can e expressly within the meaning of it, and therefore excused the delay.

On the other hand it was said, that the loss of the ship could in no possible respect be connected with the embargo. That the warranty was *positive and express*: that the ship should depart on or before the day appointed, and therefore must be complied with. Of this opinion was the Court; and accordingly the rule to set aside the verdict for the plaintiff, and to enter a non-suit, was made absolute.

ROCCUS,
No. 38.

But the necessity of a punctual adherence to the day on which the ship is warranted to sail by the policy, is not peculiar to the law of *England*: for we find that foreign writers declare, that the same rule is universally adopted. If, say they, the owner of the ship or goods has said in the policy, that he will be ready to sail at a particular time, at which, perhaps, the navigation may be less dangerous; and on this account the insurer is more easily induced to underwrite the policy; and he afterwards delay the time of sailing, and the ship and goods perish, the underwriter is not bound, for he who neglects to depart at the appointed time, must, if he fail at a subsequent period, do it entirely at his own risk (a).

If the warranty be to sail *after* a specific day, and the ship fail before, the policy is equally avoided as in the former case; because the terms of the warranty are as much departed from in the one case as in the other.

Verulam.
Grant, be-
fore Mr.
Just. Buller,
Guildhall,
Esf. V. c.
1779.

On the 8th of *December* 1777, a policy was underwritten by the defendant on goods in a *French* ship, *Le Compte de Trebon*, "at and from *Martini*o to *Havre de Grace*, with liberty to touch at *Guadaloupe*; warranted to sail after the 12th of *January*, and on or before the first of *August* 1778." The insurance was made by the plaintiff on account of *Jacques Horteloupe* and *Louis de Lannere* of *Havre de Grace*, owners of the ship and cargo; at which time it was not known whether she would

for (a) ROCCUS, in this passage, quotes the words of *Santenon*, upon insurances, who, he

load at *Martinico* or *Gaudaloupe*, they having goods to come from both places; the policy was therefore intended to cover the risk from both, or either of them. The ship, having finished her outward voyage at *Martinico*, sailed from thence on the 6th of September 1777, for *Guadaloupe*, where she took in her whole loading, without returning to *Martinico*, which the captain intended to do, had he not got a complete cargo at *Guadaloupe*; from whence she sailed on the 26th of June 1778, and was taken on the 3d of September. The plaintiff demanded payment of the loss from the underwriters, which being refused, he brought actions against them for the recovery thereof. This cause came on to be tried at *Guildhall*, before Mr. Justice *Buller*, when the defendant's objections were, that according to the words of the policy, the voyage was to commence from *Martinico*, and not from *Guadaloupe*, and that the warranty of the time of sailing was not complied with, *the ship having sailed from Martinico before the 12th of January 1778*, to wit, on the 6th of November 1777. The jury, under the direction of the learned judge, were of that opinion, and accordingly found a verdict for the defendant.

But when a ship is warranted to sail on or before a particular day, if she sailed from her port of loading, *with all her cargo and clearances on board*, to the usual place of rendezvous at another part of the same island, merely for the sake of joining convoy, it is a compliance with the warranty, though she be afterwards detained there by an embargo beyond the day. The ground is, that when a ship leaves her port of loading, when she has a full and complete cargo on board, and has no other object in view but the safest mode of sailing to her port of delivery, her voyage must be said to commence from her departure from that port. If, indeed, her cargo was not complete, it would not have been a commencement of the voyage. It is true, in the case about to be reported, Lord *Mansfield* was of a different opinion at the trial; and it certainly was a case of considerable difficulty: but when it came again before the Court, it underwent a great deal of discussion, and after long and mature deliberation of all the judges, his lordship candidly acknowledged that his former decision was wrong; and upon a subsequent oc-

C H A P. XVIII. commenced from the port of loading. As that is the leading case upon this subject, it is here reported at length.

Bond v.
Nutt,
Cowp. 601.

This was an action on a policy of insurance upon the ship *Capel* in the *West India* trade, lost or not lost, at and from *Jamaica* to *London*; warranted to have sailed on or before the first of *August* 1776. The policy was effected on the 20th of *August* 1776, at a premium of 15 guineas per cent. to return 5 per cent. if the ship departed with convoy; and 8 per cent. if with convoy for the voyage, and arrived safe. At the trial, there was no controversy about the facts; and they are shortly these: the ship was completely laden for her voyage to *England*, at *St. Anne's* in *Jamaica*; and sailed from *St. Anne's Bay*, on the 26th of *July* for *Bluefields*, in order to join the convoy there, *Bluefields* being the general place of rendezvous for convoy on the *Jamaica* station, like *Spithead* in *England*, and where a convoy then lay, which was expected to sail for *England* every day: but the greater part of the way from *St. Anne's* to *Bluefields*, is out of the direct course of the voyage from *St. Anne's* to *England*. That she arrived off *Bluefields* on the 28th or 29th of *July*, where she was immediately stopped by an embargo laid on all vessels being in any part of *Jamaica*, and was detained there till the 6th of *August*, when she sailed with the convoy for *England*; but afterwards, being separated in the passage, was taken by an *American* privateer. Upon these facts the jury found a verdict for the defendant. When this case was first argued at the bar, two points were relied upon for the defendant, in support of the verdict, which the jury had given in his favour: 1st, That the departure from *St. Anne's* was not a departure from *Jamaica*, within the meaning of the policy. 2d, If it were, that the going to *Bluefields* was a deviation. Upon the first argument, Lord *Mansfield* said: One point now started is entirely new: that supposing the voyage to have begun from *St. Anne's*, that going to *Bluefields* (which, it is admitted on all hands, was out of the course of the voyage) though for the purpose of convoy only, shall be considered as a deviation. In answer, it has been said by the counsel for the plaintiff, that there are cases in which the contrary has been held: but they are not cited. I could wish therefore that these cases might be particularly looked into, and this ground mentioned again. It is a very material point: but widely different from a warranty to depart on a particular day, which is

The second point was again argued ; and then the judges severally mentioned their ideas upon the subject, without coming it that time to any decision.

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Lord *Mansfield*.—" I am extremely glad this motion has been made ; the cause came on at *Guildhall*, by the candour of the parties in the fairest manner. But I had no intimation of its being a cause of consequence till after the verdict ; when I was informed 100,000*l.* depended upon it. The question was fairly tried, and the case has been very well argued on both sides. I have thought much of it since the trial. Some things are clear, and there are others which require consideration. The policy was made on the 20th of *August* 1776, upon the contingency of a fact, which must have existed one way or the other at the time the policy was underwritten. That contingency was, that the ship should have sailed on or before the 1st of *August* : consequently it must have taken place or not upon the 20th of that month. The port, from whence the ship was to be insured, was, if I may use the expression, the whole island of *Jamaica* : but from which of the ports the ship would sail, neither party knew : therefore they have used the words, " at and from *Jamaica* : " by force of which she certainly was protected in going from port to port, and till she failed. It follows, that the word *failed* in the warranty, must mean that she had failed on her homeward-bound voyage. The question then is a matter of fact ; and one that admits of no latitude, no equity of construction, or excuse. Had she or had she not failed on or before that day ? That is the question. No matter what cause prevented her ; if the fact is, that she had not failed, though she staid behind for the best reasons, the policy was void : the contingency had not happened ; and the party interested had a right to say, there was no contract between them. Therefore what was said in argument is very true : if she had been prevented by any accident from sailing till the second of *August*, as by the sudden want of any necessary repair, or if an enemy had been at the mouth of the port ; the captain would have done very right not to sail, but there would have been an end of the policy. It is very different from the cases where a voyage has been begun : there the usage of the voyage may justify going a little out of the direct course. This also is clear ; if the ship had broken ground, and been fairly under sail upon her voyage for *England* on the 1st of *August*, tho'

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she had gone ever so little away, and had afterwards put back from the stress of weather, or apprehension from an enemy in sight, or had then been put under an embargo, and had been detained till *September*, it would still have been a *beginning* to sail; and the stoppage would have come too late: because the warranty was upon a fact antecedent. Such a case happened before me a day or two after the present action was tried. It was an insurance upon a ship from *Grenada* to *London*, warranted to sail on or before the 1st of *August*. She had barely begun to sail on the day, when she was stopped by an embargo, and detained beyond the time. I thought the voyage was begun; the jury were of that opinion: and there has been no motion for a new trial. I am giving no opinion, only breaking the case. Here the whole question turns upon this: Did the voyage from *Jamaica* homeward begin from *St. Anne's*, or from *Bluefields*? Perhaps where a voyage is once begun, the going a little out of the way to join convoy may be very reasonable. and for the benefit of all parties: but still it does not vary the fact of sailing. Here it was very reasonable: but the question, whether the voyage began from *St. Anne's* or *Bluefields*, still remains. Another material circumstance arises from the words, "at and from *Jamaica*." At the trial, I reasoned thus: "By the terms of the policy she was protected during her stay at *Jamaica*: by force of them, she had a right to go to any port, or all round the island; and she went to *Bluefields* for reasons best known to herself. Therefore the voyage began from *Bluefields*." Had the insurance been at and from the port of *St. Anne's*, it did strike me, that going round the island to *Bluefields*, would have been a deviation. But this a question of so much value and consequence, that the Court wishes to consider the case thoroughly, before they give a final decision upon it."

Mr. Justice *Aston*.—"I shall be very glad to consider this case. As at present advised, it seems to me to depend upon a mere matter of fact: and therefore to be very different from the cases of deviation that have been put. In them, the change of voyage, being from necessity, is excused in point of law: but here, the whole question is, Did the *Capel* sail from *Jamaica* on or before the 1st of *August*, according to the true sense and meaning of the

the usage of the voyage, I should think the underwriters would be liable. So, if she had broken ground for the voyage, and had gone but a league, and been blown back again. But if she had found no convoy at *Bluefields*, she could not have staid there to wait for convoy: that would have vacated the policy. So, if her going to *Bluefields* is to be considered only as a continuation of her stay at *Jamaica*, the policy is at an end. She certainly was ready at *St. Anne's* to depart for the voyage: and she went to *Bluefields*, not to take in part of her cargo (for then it would clearly not have been a commencement of the voyage), but from a just motive. Whether that was or was not a commencement of the voyage, is clearly a matter of fact; and in this case a very material one; therefore ought to be very fully considered."

Mr. Justice *Willes*.—"This is clearly a matter of fact. I think if the ship upon her arrival at *Bluefields* had found no convoy, she could not have staid there; but must have sailed immediately: or if she had met with convoy, and had staid an unreasonable time for other ships, the insurers would not have been liable."

After these opinions, which evidently lean in support of the verdict, had been delivered, the Court took further time to deliberate; and then their unanimous opinion was pronounced by

Lord *Mansfield*.—"We are all satisfied that the truth of the case is, that the voyage from *Jamaica* to *England* began from *St. Anne's*. That when the ship sailed from *St. Anne's*, she had no view or object whatsoever, but to make the best of her way to *England*. That the value of this question, admitted on both sides, shews, that every other ship, under the same circumstances, looked upon the touching at *Bluefields*, where the convoy then lay ready, to be the safest course of navigation from *Jamaica* to *England*; and that it would have been unwise and imprudent for any ship not to have touched there. The great distinction is this: that she sailed from *St. Anne's* for *England* by way of *Bluefields*; and that it was not a voyage from *St. Anne's* to *Bluefields* with any object or view distinct from the voyage to *England*. If she had gone first to *Bluefields* for any purpose independent of her voyage to *England*, to have taken in water, or
better: ~~she would have waited in hopes of convoy coming~~

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none being ready, that would have given it the condition of one voyage from *St. Anne's* to *Bluefields*; and another from *Bluefields* to *England*. But here, under all the circumstances, we think she had no other object than to come directly to *England* by the safest course." Therefore the rule for a new trial was made absolute.

A few years afterwards a similar decision was made; and the only difference between the cases was this, that in the case now to be mentioned, it was a condition inserted in one of her clearances, that she should pass *by the place* (at which she was detained by the governor beyond the day named in the warrant) to take the orders of government. But this was not thought sufficient to induce the Court to depart from the decision in *Bond and Nutt*; especially as in this case, the place where the ship was detained was in the direct course of the voyage.

The *Hallison*
v. *Feigussou*,
Doug. 361.

It was an action on a policy of insurance on the *French* ship *L'Amable Gertrude*, "at and from *Guadaloupe* to *Havre*, warranted to sail on or before the 31st of December." It was tried before Lord *Mansfield*, when a verdict was found for the plaintiff. A motion having been made for a new trial, the case from his Lordship's report appeared to be as follows: *The ship took in her complete lading and provisions for France, and all her clearances and papers at a port, called Pointe a Pitre, in the island of Guadaloupe, and sailed from thence on the 24th of October, for Basseterre, where there is no port, but only an open road. The town of Basseterre is the residence of the French governor. The ship arrived there at night, when the captain went on shore, and next day waited on the governor, who would not permit him to depart, and to prevent it, took his ship's papers from him. At this place he was detained with his ship till the 10th of January, when he set sail with a convoy, which had arrived some little time before, and being separated after some days from the convoy, the ship was taken by an English vessel. The captain, who was the only witness produced at the trial, swore, that notice had been given on the part of the governor, some days before he sailed, to him and the other captains of ships at Pointe a Pitre, who were preparing to sail for Europe, that a convoy was ex-*

and day to get ready, and had paid extraordinary gratifications to obtain the ship's papers and clearances as soon as possible; that the desire of being in time for the convoy was the only reason for this haste; and that, although he was not able to sail till the 24th, he was still in hopes of being in time for the convoy, as he thought it might very probably have been detained at *Martinico* some days beyond its time. The last ship papers, which he received at *Pointe a Pitre*, was *Le Role d'Equipage*, or the muster roll. This paper, which was much relied upon by the counsel for the defendant, was dated the 24th of *October*, and was in the following words: "Vu par nous, chargé du detail
 " des classes au department de La Grande terre *Guadaloupe*,
 " l'equipage denommé au role des autres parts au nombre de
 " vingt personnes, le capitaine compris. Permis au Sieur *Jean*
 " *Jacques Lethuillier* commandant le navire *L'Amable Gertrude*
 " du *Havre*, de s'en servir pour faire son retour, au dit lieu,
 " passant a la *Basseterre* pour y prendre les ordres du gouvernement
 " en observant les ordonnances et reglemens de la marine."

Under this there was written, on the same paper, an account, dated the 30th of *October*, of some changes in the number of the crew, and under that, the following entry: "Vu par nous,
 " ecrivain de la marine chargé du detail des classes, les vingt
 " cinq personnes existantes au present rôle, le capitaine compris.
 " Il est permis au Sieur *Lethuillier* commandant le navire *L'Amable Gertrude*, du *Havre*, de faire son retour au dit lieu en
 " se conformant aux ordonnances et reglemens royaux de la
 " marine. A *Basseterre* *Guadaloupe*, le 2 *Janvier* 1779." On another paper, called *Le Congé*, dated the 16th of *October*, which was read on the part of the plaintiff, there was written, at the bottom, as follows: "Vu de relache a la *Basseterre* *Guadaloupe*,
 " pour y attendre un convoi pour *France*. Ce 28 *October* 1778.
 " *Monenteill*." The captain swore that he understood the only reasons for the condition in the muster roll, that he should go to *Basseterre*, were, the convoy was to be at that place, and that he might take such dispatches as were ready for *Europe*. He had not objected to it; because in the regular course of his voyage to *France* from *Pointe a Pitre*, he must have gone that way, close under the guns of *Basseterre*, in order to avoid *Montserrat*, there being no other road, except they were to keep quite to the leeward, which is not the custom. If he had arrived there in the day-time, he would not have cast anchor, or would have

C H A P. his boat for the dispatches; but having arrived at night, his ship
 XVIII. had been detained, contrary to his intention and expectation,
 The defendant's counsel, to invalidate the captain's testimony,
 besides the muster roll, and the entry under it, as above stated,
 read the protest made by the captain on his arrival at *Dover*;
 and also his deposition in answer to the 29th interrogatory in the
 proceedings in the Admiralty on the condemnation of the ship.
 The words of the protest, on which they relied, were as follows:
 "whereupon he (the captain) waited on the proper officer at
 " *Pointe à Pitre* for his muster roll, and was by him informed,
 " it could not be granted, but on condition that he should first
 " sail to *Basseterre*, and there wait the directions of the general
 " of the island." And in a subsequent part, "Whereupon at
 " his (the captain's) instance, the said *John Nicholas Lethuillier*,
 " his father came to *Basseterre*, and went with Messrs. *Gobert*
 " and *Betuel*, commissioners of commerce, to the superintendent,
 " and also to the general of the island, stating to them that the
 " said ship and cargo were insured upon condition that she should
 " have departed from the island of *Guadeloupe* before the 31st of
 " *December*, the terms of which insurance they judged it essential
 " to fulfil, notwithstanding which they were still refused per-
 " mission to depart, and were kept there until after the 31st of
 " *December*." The deposition relied on was as follows: "At
 " the time the ship was first pursued and taken, she was steering
 " her course towards *Brest*. Her course was not altered upon
 " the appearance of the vessel, by which she was taken. Her
 " course was at all times, when the weather would permit, di-
 " rected to *Brest*, for which port she was directed to sail, al-
 " though the destination was for *Havre de Grace*, by the ship's
 " papers. She was not, before nor at the time of the capture,
 " sailing beyond or aside of *Havre de Grace*. She was then about
 " eight leagues west of *Ushant*, and her course was not altered
 " to any other port or place, but was obliged to be directed to
 " *Brest*, in consequence of the orders he had received, subse-
 " quent to the delivery of the ship's papers." In answer to the
 27th interrogatory, his deposition was, "That all the ship's pa-
 " pers found on board were true and fair, and none of them
 " false and colourable." At the trial the captain swore, that he
 had received directions to keep in the course to *Brest* at *Basse-*
terre from his father, who had formerly commanded the ship;

but

but this was done as the safest way, in time of war, of getting to Havre, which still continued to be the place of the ship's destination. Upon this evidence, the defendant's counsel made two objections, as grounds for a new trial: 1st, That there had been no inception of the voyage on the 24th of October, nor till after the 31st of December: 2dly, that the ship never sailed on the voyage insured, viz. from Guadaloupe to Havre, but on a voyage from Guadaloupe to Breſt. After both these points had been fully argued at the bar,

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As to the 2d point vide ante, c. 17.

Lord Mansfield said:—"In my apprehension, there is no contradiction between the parole evidence, and the protest and depositions. This captain had never heard of the case of *Bond* and *Nutt*. Under an insurance at such a place as *Guadaloupe* or *Jamaica*, the ship is protected in going from port to port in the island. But the question here is, whether the voyage was *bonâ fide* commenced; and stopped by accident. As to the condition about taking the orders of government, the ship could not sail from any part of the island without the governor's leave. But the captain when he left *Pointe à Pitre*, expected to meet a convoy at *Basseterre*, and to proceed immediately without interruption. A convoy had been published, and he certainly would have gone to *Basseterre* at any rate, independent of the clause in the muster roll. With regard to the second point, the voyage to *Breſt*, was, at most, but an intended deviation, not carried into effect."

Vide c. 17.

Mr. Justice Willes and Mr. Justice Ashburſt concurred.

Mr. Justice Buller.—"The case in 1777 between the same parties is in point. There was no embargo there, nor in the present case, when the ship sailed. There must be a lawful *bonâ fide* sailing, which I think there was in this case. The ship was completely ready in all respects." The rule for a new trial was, therefore, discharged.

See Lord Mansfield's opinion in the case of *Bond v. Nutt*, where he quotes the rule al-

Notwithstanding the uniformity of decision in all these cases, the judgment given in the last cause was not satisfactory to about twenty other underwriters upon the same policy, nineteen of whom obtained leave to consolidate their different causes un-

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Story of the
Consolidation
Rule.

Thelluson
v. Staples,
Sittings at
Guildhall,
Eas. Vac.
1786.

the usual terms, in order to bring the question once more into court. Accordingly, in the ensuing sittings, the cause was set down for trial,

In this cause, the second point as to the deviation was abandoned; and on the first, the same evidence was given as upon the former occasion. The point was again fully argued for the defendant.

Lord Mansfield.—“The single question on this policy is, Whether the ship sailed on her voyage to *Havre* before the 31st of *December*? She certainly sailed from *Pointe a Pitre* completely loaded before that time. The doubt on the first question of this sort was this: the policy was “at and from *Jamaica*,” now the word *at* certainly comprises the whole island, and, under that word, you may sail from one port to another every where along the coast of the island. The ship, therefore, in that sense, was still at *Jamaica*, after she had got to *Bluefields*. She did not leave *Bluefields* till after the day named in the warranty, and that place was quite out of the course of navigation from *St. Anne's* to *England*. I own at the trial, I thought the voyage to *England* did not commence till the ship sailed from *Bluefields*, and, according to my opinion then, a verdict was found for the defendant. But there was a doubt. I therefore wished (as I always do in such cases) that the opinion of the court might be taken in order to settle the point. The case, when it came on in court, was very ably argued; I was completely convinced, and the court were unanimously of opinion, that the voyage to *England* began when the ship sailed from *St. Anne's*; and upon the second trial, the plaintiff had a verdict. *Earle* and *Harris*, was still a stronger case. There an embargo was actually published, before the ship sailed, and the captain, immediately after crossing the bar, returned to make a protest, and sent his ship knowingly into the embargo: but he swore that he expected the embargo was to be taken off, and that he should proceed immediately upon his voyage; and the jury believed him. In this case to go by *Reps*. There was public notification of a convoy to be at *Basseterre* on the 25th of *October*. The captain thought that it might be stopped a day or two at *Martinico*, and that he should get to *Basseterre* in time. He worked night and day, doubtless, his papers, and sailed with full preparations,

Earle v.
Harris, at
Guildhall,
Hil. Vac.
1780.

of pursuing his voyage directly. He knew of no embargo, and *Basseterre* was directly in his road. In that respect, this case differs strongly from *Bond v. Nutt*. He was even in the regular voyage obliged to pass under the cannon of *Basseterre*. He had his muster-roll, on condition of calling there; but he made no difficulty of taking it on that condition, because he knew he must pass that way at all events. Did he not *bona fide* begin his voyage? He certainly had no idea, when he sailed from *Pointe a Pitre*, of meeting with any stop. So it was in the former case of *Thellusson v. Fergusson*. There was no idea of the embargo in that case, when the ship sailed. Here there is not the least suspicion of fraud. This captain certainly did not know of the decision in *Bond v. Nutt*. He thought, when he was detained at *Basseterre* beyond the 31st of *December*, that the policy was forfeited, which is a strong circumstance in the plaintiff's favour, for it shews that the sailing was not colourable. 'This question has undergone the consideration of a special jury and of the court. Underwriters have a right to litigate questions, which seem to them to be in their favour. But, at last, there should be an end of litigation. If you should be of the same opinion with the former jury and the court, you will find for the plaintiff?' which they did accordingly. The cause of the twentieth underwriter, on the same policy, who refused to consolidate, stood next in the paper for trial; but upon the above verdict being given, his counsel consented that a verdict should also be entered against him.

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The Grenada Case,
Vide supra.

From this long train of uniform and consistent determinations, it should seem that the question, what shall or shall not be a departure within the meaning of the warranty is now completely settled. In insurances *at and from London*, warranted to depart on or before a particular day, it has long been a question, what shall be a departure from the port of *London*; or rather what is the port of *London*: and it is singular that this point has never yet been judicially determined. On the one hand it is said, that the moment a ship is cleared out at the custom-house, and has all her cargo on board, if she quit her moorings in the river on or before the day warranted, that the warranty is complied with. On the other side it is contended, and with great appearance of reason, that a ship is not ready for sea, till she has got her custom house cocket on board, which is the final

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she cannot have till she arrive at *Gravesend*: that till this cocke is received, the ship dare not proceed to sea under a penalty, and till then is not entitled to the drawbacks, and that *Gravesend* is always considered as the limits of the port of *London*, and unless the ship sailed from thence on or before the day limited, there is no inception of the voyage, and the policy is forfeited.

Rogers v.
Royal Ex-
change Assu.
Comp. Sitt
in C. P. after
Mich. 1787,
before Lord
Loughbo-
rough.

In a late case, the Royal Exchange Assurance Company resisted a demand made upon them, in order to try this great question: but as it appeared from the evidence of the log-book that the ship did not in truth break ground till after the day named in the warranty, the plaintiff was nonsuited; and the question remains undecided.

Postlethw.
Dict. t. t.
Convoy.

The second species of warranty, which most frequently occurs in insurances, is that of sailing under the protection of convoy; that is, certain ships of force, appointed by government, in time of war, to sail with merchantmen from their port of discharge to the place of their destination. When the nature of a convoy is considered, it is highly reasonable, that the policy should be forfeited, if the insured fail to comply with so material a condition; because the risk, which the underwriter takes upon himself, is very considerably increased, in time of war, by the want of con-
voy.

Emerigon,
Tarité des
Assurances,
n. 164.

Accordingly, by the laws of this, and of all other maritime powers, if the insured warrant that the vessel shall depart with convoy, and it do not; the policy is defeated, and the underwriter is not responsible. We have already seen, that every warranty must be strictly and literally complied with; and that a liberal and substantial performance merely will not be sufficient. Hence in a warranty to sail with *convoy*, it becomes material to consider, what shall be deemed a *convoy* within such a condition. Upon this point it has been solemnly settled by the court of King's Bench, Mr. Justice *Willes* excepted, who differed from the other learned judges upon that occasion, that it is not every single man of war, which chuses to take a merchant ship under its protection, that will constitute such a convoy as a warranty means; but it must be a naval force under the command of a person appointed by the government of the country to which they belong. The reason of such a decision is wise; because government must be to be kept informed of the designs and strength of the naval force would be sufficient to inform their

attempts. In the case, in which these points were settled, it also became a question, how far sailing orders from the commander in chief to the particular ship or ships, were requisite to the constitution of a convoy. But it was not thought necessary to decide that point, although it seemed to be the opinion of the majority of the judges, that they were not absolutely essential.

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This case came before the court upon a rule to shew cause why the verdict, which the defendant had obtained, should not be set aside and a new trial had. It was an action upon a policy of insurance on the ship *Arundel*, captain *Mann*, at and from *Jamaica to London*, warranted to depart with convoy. The insurance was at 18 guineas *per cent.* to return 3 *per cent.* if the ship failed on or before the first of *August*. The facts appearing on the report of Lord *Mansfield*, who tried the cause, are these: On the 25th of *July* the *Arundel* sailed from *Morant* harbour to *Kingston*, where she met the *Glorieux* man of war, Captain *Cadogan*, who was likewise on his way to join Admiral *Graves* at *Bluefields*. Lord *Rodney* had appointed Admiral *Graves* to rendezvous at *Bluefields*, in order to take the fleet of merchant ships, which were to sail from thence upon the 1st of *August*, under his command, and to convoy them to *Great Britain*. Captain *Mann*, upon their meeting in *Kingston* harbour, asked for sailing orders from Captain *Cadogan*, who said, he had none, not having himself at that time joined the Admiral: but he was sure that Admiral *Graves* would not sail from *Bluefields* till the *Glorieux* joined him. However, if he should have failed, he, Captain *Cadogan*, would give Captain *Mann* sailing orders, and take every care of the *Arundel* in his power. They proceeded together, and arrived at *Bluefields* on the 28th of *July*: but they found that Admiral *Graves* had sailed two days before. The *Glorieux* and *Arundel* then sailed from *Bluefields*, the former firing guns, giving signals, and behaving in every respect like a convoy. Upon the fifth of *August* a signal was made, that the fleet was in sight; and on the seventh they joined the fleet off *Cape Antonio*. The *Arundel* was afterwards lost in *September*, in a dreadful storm, which dispersed the whole fleet, and in which a vast number of the ships perished. Upon this evidence, the jury were of opinion, under the direction of the Chief Justice, that the terms of the warranty had not been performed.

Hibbert v.
Pigou,
B. R. Lest.
23 Geo. III.
1783.

C H A P. this question had been fully argued at the bar, the three judges,
 XVIII. Mr. Justice *Ashburst* being, at that time, one of the Lords Commissioners of the Great Seal, delivered their opinions severally.

Lord *Mansfield*.—"Though the underwriters and insured are equally innocent; yet I cannot help saying, that now, as well as at the trial, my inclination led me to wish, that the plaintiffs were in the right. But the more it is argued, it is the less liable to dispute. There are hypothetical contracts and conditional contracts. In the former, the contract depends upon an event taking place; there is no latitude; no equity; the only question is, has that event happened. But conditional contracts admit of a more liberal construction. Now the only question upon this contract is, Whether this ship has departed with convoy? A great deal must be referred to the usage of merchants. The government appoints a convoy for the trade, and also names a place of rendezvous. Then comes the reference to the usage of merchants; the voyage is begun at *Kingston*; but the risk only commences at *Bluefields*. Now though Lord *Rodney* desires the captain of the *Glorieux* to take any ships he may pick up in his way, and convoy them to *Bluefields*; yet the warranty in the policy by the usage, does not require convoy to *Bluefields*. The second reference to the usage of merchants is, What is esteemed a convoy by merchants? A convoy is a naval force, under the command of that person, whom government has appointed. They trust to the knowledge of government, which must be supposed to be better acquainted with the plans and force of the enemy, and with the strength necessary to repel their attempts. Now this is the general usage, to which matters of this kind are referred. Then let us see what the case is here.—Lord *Rodney* appoints Admiral *Graves* to go with ten sail of the line to *Bluefields*; and from thence to convoy the *Jamaica* trade to *Great Britain*. When they come to the place of rendezvous, they take sailing orders from the Admiral, which are essential to convoy, as by them they know the signals, for what places they are to steer, in case of dispersion by storm, or any other just cause (a). Admiral *Graves*, on
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(a) Since the two former editions of this work, I have met with a case of *Vardon v. Widdowes*, in *Guildhall*, July 1744, in the time of Lord Chief Justice *Lee*, where the ship had departed from *London*, and arrived at the *Downs* 23d August, where the (convoy) were under sail, and the captain sent one of his men

the 26th of *July*, for reasons best known to himself, thinks he has got all the ships, for which he ought to stay, and proceeds on his voyage. He leaves no order for the *Glorieux* to follow him to *Cape Anthonio*; and though it is very true, that it is in the power of the Commander in Chief to change the place of rendezvous, yet in this case it is not true, as was supposed in argument, that *Cape Anthonio* was appointed. At the time of sailing from *Bluefields*, the *Glorieux* was no part of the convoy; for she did not come there till two days after the fleet was gone. Upon these facts it did appear to me, and to the jury at the trial, that the warranty was not complied with: I continue of the same opinion now; and that this rule should be discharged."

Mr. Justice *Willers*.—"I cannot perfectly coincide with every thing which Lord *Mansfield* has laid down. The form of the contract is in general words "*to depart with convoy*," without mentioning any particular day, or pointing out any specific convoy. The terms of the policy seem to me to have been literally and substantially complied with; for there was no laches on the part of the *Arundel*; she came with all possible expedition, and was at *Bluefields* two days before the time appointed for sailing. When Captain *Mann* found that the fleet was gone, he did every thing in his power for the security of the ship; for he put himself under the protection of the *Glorieux*, which was appointed by Lord *Rodney* to make a part of the convoy: and it appears in evidence, that in every respect Captain *Cadogan* behaved as a convoy. I have searched a good deal for cases; and I can only find one in *Strange*, 1250, upon the subject of failing orders; and I do not think that case goes so far as to say, that failing orders are essential to a convoy. The loss of the *Arundel* happened long subsequent to her joining the fleet; and I am therefore of opinion, that the warranty in this policy has been substantially performed."

Mr. Justice *Buller*.—"In deciding this case, it is not necessary to say, whether failing orders are essential or not: as at present advised, I do not say that they are absolutely necessary. The

"and I will take care of you;" and the ship being lost the striking on the shore, the question was, If the ship was put under convoy, and it was

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present question is simply this: Did the *Arundel* sail with convoy? This is a condition which must be literally complied with, as all the cases agree. As to the question itself, it is undoubtedly a question of fact: and the facts of the case seem to me to prove, that the *Glorieux* was no part of the convoy. Admiral *Graves* had sailed before they arrived; and that circumstance, which my Lord stated, seems very material, that no orders were left behind for the *Glorieux*. I say that, on this evidence, she was not a part of the convoy: for in order to make her so, it must appear that she was under the orders of *Graves*. Did he leave her behind to take care of the ships that remained? If so, it would alter the case very materially. But there was no such idea; for if there had, the *Glorieux* would have remained at *Bluefields* for the rest of the ships, until the 1st of *August*: on the contrary, Captain *Cadogan*, finding that Admiral *Graves* was gone, immediately followed; for his sole object was to join Admiral *Graves*. *Ships must sail under the convoy appointed by the government of the country, who proportion the strength of it to the necessity of the times. To what end would this care be taken, if merchantmen were to sail under the protection of single ships, with which they may happen to meet? I am therefore of opinion, that if a ship do not sail with the convoy appointed by government, it is not a sailing with convoy, within the terms of the policy."* The rule for a new trial was therefore discharged (a).

Webb v.
Thomson,
1 Bos. &
Pull. 5.

This question respecting the necessity of having sailing instructions from the commander of the convoy came on to be considered in the Court of Common Pleas, upon a motion for a new trial, when Mr. Justice *Buller*, in the absence of Lord Chief Justice *Eyre*, said, "Had not my Lord mentioned that the verdict was entirely to his satisfaction, I should not decide upon this application in the first instance. The case is here brought to a question of law. *In point of law, then, the general proposition is, that sailing instructions are necessary. I have never decided this*

(a) Another action was brought upon the same policy against another of the underwriters; and although a verdict in that case was found for the plaintiffs: yet it seems to me to leave the doctrines above advanced unshaken: for upon the second trial it was proved, beyond all doubt, that the *Glorieux* was in truth a part of the convoy, a fact, which was left doubtful in the first: and it was upon that fact that Lord Mansfield and

case myself, but it has often been determined at *Guildhall*. I do not say that there may not be cases in which they may be dispensed with. In *Hibbert v. Pigou*, my expression is, "It is not necessary to say, whether sailing orders are essential or not; as at present advised, I do not say that they are absolutely necessary." The case of *Victoria v. Cleeve* goes no further. If the captain, from any misfortune, from stress of weather, or other circumstances, be absolutely prevented from obtaining his instructions, still it is a departure with convoy: but then he must take the earliest opportunity to obtain them. Generally speaking, unless sailing instructions are obtained, the warranty is not complied with: the captain cannot answer signals; he does not know the place of rendezvous in case of a storm; he does not in effect put himself under the protection of the convoy, and therefore the underwriters are not benefited." The other judges concurred in this opinion.

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See post.
453.

In a still later case, in an action on a policy of insurance on the ship *Potomack*, at and from *Jamaica to London*, warranted to depart with convoy from the place of rendezvous on or before the 1st of *August 1705*: it was admitted that the vessel never had got so near to the admiral, who had in fact left the place of rendezvous before the *Potomack* arrived there, as to obtain sailing orders, when he lost sight of the convoy, and was afterwards taken. The plaintiff's object was to get a decision upon the point, *How far sailing instructions were essential to the sailing with convoy?*

France v.
Kirwan,
Sittings at
Guildhall
after Mich.
38 Geo. 3.

See a very
elaborate
judgment of
Lord Eldon
on this point
in the case of *Anderson v. Pitcher*, 1 Bos.
& Pull. 264.

Lord *Kenyon* expressed the strong inclination of his opinion to be, that they were essential, but would not decide it, as this vessel had never *in fact* joined. The plaintiffs were nonsuited.

Although the decisions of the courts of common law require no additional authority to support them; yet it will be proper, merely by way of illustration, to point out to the reader, in what cases the opinions of foreign writers agree with the determinations of the *English* courts of justice. Monsieur *D'Emérigon*, a very distinguished *French* writer upon this branch of jurisprudence, puts this case: "On avoit fait des assurances sur un navire, de sortie de *Marseille* jusqu'aux ports de *Gibraltar*, et dans la police il étoit dit que *Marseille* étoit le port de destination." *Mar.*

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“ *nulle*. Une fregate, chargée de munitions de guerre pour
“ *Algeiras*, se trouvoit à l’*Esclaque*. Le navire assuré mit à la
“ voile sous les auspices de cette fregate, qui lui accorda pro-
“ tection, et qui partit en meme temps. Consulté sur ce cas,
“ je fus d’avis que si le navire étoit pris par les ennemis, les as-
“ sureurs seroient fondés à refuser le payment de la perte : *car*
“ *autre chose est d’être sous l’escorte d’un bâtiment du roi, et autre chose*
“ *est de naviguer simplement sous ses auspices.*”

See the case. From the case of *Hibbert and Pigou* we collect this; that a convoy appointed by the admiral commanding in chief upon a station abroad, is a convoy appointed by government. And besides the instruction it affords, applicable to the particular subject, for which it was here inserted, it serves to establish some principles laid down at the beginning of this chapter; that whether the loss do or do not happen, on account of the breach of the warranty, still the policy is forfeited: for in that case, the ship insured perished in a storm, long after she had joined the regular convoy; and consequently the loss did not happen, on account of the breach of the condition.

Having seen what shall be deemed a convoy, let us proceed to consider what shall be a *departure with convoy*, within the meaning of a warranty to *depart with convoy*. The rule on this point is short and clear, that such a warranty implies, that the ship shall go with convoy from the usual place of rendezvous, at which the ships have been accustomed to assemble; as *Spit-head*, or the *Dorons*, for the port of *London*; and *Bluefields* for all the ports in *Jamaica*. And from the particular port to such usual place of convoy, the ship is protected by the policy.

Letchullier’s
case, 2 Salk.
445.

Thus in an action on a policy of insurance by the defendant at *London*, insuring a ship from thence to the *East Indies*, warranted to *depart with convoy*; the declaration states, that the ship went from *London* to the *Dorons*, and from thence with convoy, and was lost. After a frivolous plea and demurrer, the case stood upon the declaration, to which it was objected, That here was a *departure without convoy*.

The clause, warranted to depart with convoy, must be construed according to the usage among merchants; that is, from the place where the goods are to be had, as the *Dorons*.

It is true, Lord Chief Justice *Holt*, upon that occasion, was of a different opinion; but the judgment of the other judges was relied upon, and confirmed in the following case by Lord Chief Justice *Lee*, and has also been recognized in several other cases, in which the question has come collaterally before the Court. Indeed, of late years, it has been tacitly acquiesced in; for there never was a convoy from the port of *London*.

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On an insurance from *London* to *Gibraltar*, warranted *to depart with convoy*, it appeared that there was a convoy appointed for that trade at *Spithead*, and the ship *Ranger* having tried for convoy in the *Downs*, proceeded for *Spithead*, and was taken in her way thither. The insurers insisted, that this being the time of a *French* war, the ship should not have ventured through the *Channel*, but have waited in the *Downs* for an occasional convoy. And many merchants and office-keepers were examined to that purpose. But Lord Chief Justice *Lee* held, that the ship was to be considered as under the defendant's insurance to a place of general rendezvous, according to the interpretation of the words, "warranted to depart with convoy." *Salk.* 443. And if the parties meant to vary the insurance from what is commonly understood, they should have particularized her departure with convoy from the *Downs*. The jury was composed of merchants, who found for the plaintiff, upon the strength of this direction,

Gordon v
Morley,
2 Stra. 1265.

A similar decision was made in the year 1781, by the Admiralty of *France*, which is reported in the work of *Emerigon*.

Upon this kind of warranty, it is to be observed, that although the words commonly used are, "to depart with convoy," or, "to sail with convoy;" yet they extend to sailing with convoy throughout the whole of the voyage, as much as if those words were inserted. Indeed to suppose the contrary would introduce an infinite variety of frauds; as a ship would sail out of harbour with the convoy, continue with it for an hour or two, then leave it, and run every peril, at the risk of the underwriter. If, therefore, the convoy is only to go a part of the way, that is not a compliance with the warranty; and the insurer is discharged from

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3 Lev. 320.

This was one of the points ruled in *Jeffreys v. Legendra*, that will be quoted at length presently, in which Lord Chief Justice Holt and the rest of the Court held, that although the words of the policy only were "to depart with convoy," yet they extend to sail with convoy throughout the whole voyage.

In a more modern case, however, this doctrine came again in question; and after very full consideration, the opinion of Lord Holt was unanimously confirmed by the whole Court of King's Bench.

Lilly v.
Ewer,
Doug. 72.

It was an action for money had and received, brought against an underwriter for a return of premium. The policy was on the ship the *Parker Galley*, "at and from Venice to the Currant Islands, and at and from thence to London," at a premium of five guineas per cent. "to return 2 per cent. if the ship sailed with convoy from Gibraltar, and arrived." The ship touched at Gibraltar on her way home, and sailed from thence under convoy of the *Zephyr* sloop of war, but the convoy was destined only to go to a certain latitude, about as far as Cape Finisterre, being ordered on the Lisbon station; and accordingly the ship and convoy separated, and the ship arrived safe at London. The only question in the case was, Whether, by the terms of the policy, the condition for the return of premium was a departure from Gibraltar with such convoy as could be met with, for whatever part of the voyage that might happen to be, or a departure with convoy for the voyage? The trial came on before Lord Mansfield and a common jury, when a verdict was found for the plaintiffs.

A rule having been obtained to shew cause why there should not be a new trial: the evidence from his Lordship's report appeared to be thus: That the plaintiffs had called witnesses (one of whom was Mr. Gorman, an eminent merchant) to prove that, for some years past, when convoy for the voyage, or the whole voyage was intended, those explanatory words had been added, and that, by this usage, the expressions of "sailing with convoy," and "sailing with convoy for the voyage," had received distinct technical meanings: "with convoy," signifying whatever convoy the ship should depart with, whether for a greater or less part of the voyage. Several policies were also produced, which

had been filled up at the office of the same broker, who had prepared that which had given occasion to this cause, in which the words "for the voyage," or "for *England*," were added. The captain proved, that at the time when he left *Gibraltar*, no other convoy was to be had. The witnesses for the defendant swore, that they understood the words "with convoy," to mean, *convoy for the voyage*; and the broker said, that, at the time this policy was signed, he understood and apprehended it was so understood by all the parties, that the convoy was to be for the voyage, and that the return was such as was usual, when convoy for the voyage was meant. His Lordship, after stating the evidence, said, that when the case was opened, he thought, on the face of the policy, that the words must mean for the voyage. He had not admitted the counsel to ask the opinion of the witnesses on the construction; but to learn whether there was any usage in this case, which would give a fixed technical sense to the words. This was a question of fact to be ascertained by evidence, and proper for the consideration of a jury.

The case was fully argued at the bar.

Lord Mansfield.—"On the words I was strongly of opinion, that the policy meant a departure with convoy intended for the voyage. The parties could not mean a departure with convoy, which might be designed to separate from the ship in a minute or two; though when convoy for the whole of a voyage is clearly intended, an unforeseen separation is an accident, to which the underwriter is liable; for the meaning of such a warranty is not that the ship and convoy should continue and arrive together. But I still think that the evidence was properly admitted at the trial of this cause; because the sense contended for by the plaintiffs, was not inconsistent with the words of the policy, and therefore it was material to see what the usage was. I laid great stress on Mr. Gorman's testimony. I did not consider him as a common witness. However, it seems, from what I have heard since, that people in the city are dissatisfied with the verdict, and think the evidence of the plaintiff's witnesses was founded on a mistake. Certainly critical niceties ought not to be encouraged in commercial concerns; and wherever you render additional words necessary, multiply them; you also multiply doubts and criticisms."

C H A P. XVIII. cause words have been added in some instances, to force a construction in this case, from the omission of them. The question is of great importance."—The rule therefore was made absolute.

Doug p. 74. The new trial came on before Lord *Mansfield* at the sittings
note (7); after *Trinity* term, 19 *Geo.* 3. when the verdict was found for the defendant, the insurer.

Doug. 73. But although it has been thus settled, that a ship must depart
1 Emerigon, with convoy for the whole of the voyage; yet in the last case, it
166. was truly said by Lord *Mansfield*, that an unforeseen separation is an accident, to which the underwriter is liable. It is the law of reason and common sense; for it would be the height of injustice and cruelty to heap misfortune upon misfortune, and to say, that because a ship has been separated from her convoy by stresses of weather, or the fury of the elements (perils insured against by the policy), that the insured shall suffer still greater misery, by being deprived of that indemnity which he had secured to himself by paying a sufficient and adequate premium. The law of *England* does not tolerate such principles: and the first decision upon the subject was such, that it never has been departed from in any instance.

Jeffrey v. Assumpsit on a policy of insurance made in the usual form,
Legendra, "from *London* to *Cadiz*, warranted to depart with convoy."
3 Lev. 320. Upon the general issue pleaded, the jury found a special verdict,
2 Salk. 443. stating, that the ship did depart from the port of *London*, in com-
Carth. 216. pany of the convoy intended, and sailed together as far as the
3 Show. *Isle of Wight*, in pursuance of the voyage towards *Cadiz*; and
120. 4 there they were separated by stresses of weather; that the convoy
Mod. 58. put into *Zorbay*, and the insured ship into the port of *Fowey* in
S. C. *Cornwall*. That three days afterwards, the wind setting right to bring the convoy down the channel, the master of the insured ship sailed out of *Fowey* on purpose to meet the convoy; but it did not come: and then the insured ship was seized with another storm, so that she could not return from whence she came, but was driven upon the *French* coast, and there taken by the enemy.

After several arguments of this special verdict, the plaintiff
sint p. curiam; and their principal reason was,
that, by reason of neglect or other default found

in the master of the ship ; but it appeared he had done all in his power to keep in company of the convoy. It is found expressly, that he departed with convoy from his first port, which answers the words of the policy : but it would have been otherwise, if any fraud or neglect had been found in the master of the insured ship after his departure, notwithstanding he departed out of the first port with convoy ; for the meaning of the words "*warranted to depart with convoy*" is, that the insured ship should keep company with the convoy, during the whole voyage, if possible.

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Even where the ship has by tempestuous weather been prevented from joining the convoy at all, at least, of receiving the orders of the commander of the ships of war, if she do every thing in her power to effect it, it shall be deemed a sailing with convoy, within the terms of the warranty.

As to this point, see the cases ante, p 443. et. seq. and probably some doubt may arise as to the following case.

The plaintiff had insured on goods in the *John and Jane*, from *Gottenburgh* to *London*, with a warranty to depart with convoy from *Fleckery*. In *July 1744*, the ship sailed from *Gottenburgh* to *Fleckery*, and there she waited for convoy two months. On the 21st of *September*, at nine in the morning, three men of war, who had one hundred merchant ships in convoy, stood off *Fleckery*, and made a signal for the ships there to come out, and likewise sent in a yaul to order them out. There were fourteen ships waiting, and the *John and Jane* got out by twelve o'clock, and one of the first ; the convoy having sailed gently on, and being two leagues a-head. It was a hard gale, and by six in the afternoon, the ship came up with the fleet ; but could not get to either of the men of war for sailing orders, on account of the gale of wind. It was stormy all night, and at day-break the ship in question was in the midst of the fleet ; but the weather was so bad, that no boat could be sent for sailing orders. A *French* privateer had sailed amongst them all night : and it being foggy on the 22d, attacked the *John and Jane* about two, who kept a running fight till dark, which was renewed the next morning, when she was taken. For the defendant it was insisted, that this ship was never under convoy, nor is ever considered so, till they have received sailing orders ; and if the weather would not permit the captain to get them, he should have gone back.

Victoria v.
Clieve,
2 Stra.
1250.

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Sir William
Lee.

But the Chief justice and the jury were both of opinion, that as the captain had done every thing in his power, it was a departing with convoy: and those agreements are never confined to precise words; as in the case of departing with convoy from *London*, when the place of rendezvous is *Spithead*, a loss in going thither is within the policy. So the plaintiff recovered.

But it is evident from all that has been said, that if there be an opportunity of convoy; if the convoy throw out repeated signals to join; and by the negligence and delay of the captain of the insured ship, the opportunity be lost, the warranty to depart with convoy is not complied with, and the underwriter is discharged.

Taylor v.
Woodness,
Sittings at
Guildhall,
Hil. Vac.
4 Geo. 3.

Thus in an action on a policy of insurance tried before Lord *Mansfield*, the plaintiff was nonsuited, there being a warranty to depart with convoy; and it appearing from the evidence, that the commodore of the convoy had made signals for sailing from *Spithead* to *St. Helen's* the night before, and had made repeated signals the next morning from seven o'clock till twelve, notwithstanding which, the ship insured had neglected to sail with him, and did not sail till two hours after, in consequence of which she was taken by a privateer (*a*).

Although we have thus seen, that a ship must not voluntarily depart from convoy during the voyage (*b*), yet this species of warranty must always be construed with reference to the usage of trade, and to the orders of government. For if the course upon a particular voyage has been to have a relay of convoy, protecting the trade from one port to another; or if government appoint a convoy to escort the trade of a place to a given latitude and no farther; and there be no other convoy on that station, a vessel, taking the advantage of such a convoy, has complied with the warranty to sail with convoy for the voyage.

Thus in an insurance on the ship *William*, "at and from *London to Jamaica*," warranted to depart with convoy for the voyage,

(B) As to the duty of the officers appointed for convoy to merchant ships, see it prescribed in the Stat. of the 13 Car. 2. stat. 1. c. 9. art. 17., which regulations were confirmed by the 2d of Geo. 2. c. 33. f. 2. art. 17.

statute. See post. c. 456.

Lord *Mansfield*, in the course of his summing up to the jury, C H A P.
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said, "A warranty to sail with convoy means with such a con-
voy as government pleases to appoint; and whether it consists
of separate ships at different stations or not, it is a convoy for
the voyage; therefore on that point there is no doubt."

The same doctrine was held by Lord *Kenyon*, in an action on a policy of insurance *at and from Cadiz to Amsterdam, warranted to sail with convoy for the voyage*. The ships insured had sailed from *Cadiz* under a *British* convoy; and were lost before they reached the *Downs*, where it was alleged they were to have taken a fresh convoy for *Amsterdam*. The underwriters insisted that the convoy should have been direct to *Amsterdam*. The assured, on the other hand, contended, that all convoy must be according to usage, and that in many voyages there is no such thing as a direct convoy, but that the vessels proceed by relays of convoy from stage to stage. The special jury, with Lord *Kenyon's* approbation, gave a verdict for the plaintiffs. And although in that case, it is true, the underwriter had adjusted the policy *with full knowledge* of all the circumstances, which his lordship seemed to think conclusive, yet there were other causes on the same policy, where there was no adjustment; and upon Lord *Kenyon* and the jury declaring that, without considering the adjustment, they thought the warranty had been complied with, the plaintiff had a verdict, and no motion was ever made for a new trial in any of these causes.

De Garay
v. Clagget,
London,
Sitt. after
Mich. 1795,

So also the Court of Common Pleas decided in an action on a policy on the ship *Little Betsey*, at and from *London to St. Sebastian, warranted to sail with convoy*. The ship sailed with other vessels under convoy of several ships of war: and after a certain latitude, the *Weazel*, one of the men of war, was detached to convoy the *Spanish* ships; but the captain of that ship had orders to go with the *St. Sebastian* ships no further than *Bilboa*, and in fact he went no farther. A verdict passed for the plaintiff. When the case came on before the Court on a motion for a new trial, it was argued for the underwriters, that warranties are to be strictly complied with; and that however near the port of *St. Sebastian* might be to *Bilboa*, yet the principle was the same; and that a convoy to the latter place could not be construed to be a convoy to the former than a conv-

D'Eguino v.
Rewicke,
2 H. Black.
c. 1.

C H A P. XVIII. *Hope* could be a convoy to the *East Indies*, and for this was cited *Hibbet v. Pigou* (supra 443).

Mr. Justice *Buller*.—"The case of *Hibbert* and *Pigou* is not applicable to this, for there a convoy was appointed and actually sailed from *Jamaica* to *England*; as to the instance put at the bar of a convoy to the *Cape of Good Hope*, I entirely differ from the counsel on that point; for if government thought a convoy to the *Cape* was a sufficient protection to the *East India* trade, and the usage were for the *East India* ships to sail with a convoy only to the *Cape*, and to consider that as the *East India* convoy, and no other convoy was appointed to the *East Indies*, I should hold that the warranty was complied with; though I agree if there was another convoy to the *East Indies*, it would be otherwise. The captain of a merchant ship has nothing to do with, nor can he know the instructions from the Admiralty to the king's officers, but must take such convoy as he finds. I am therefore of opinion that there is no ground at all for this motion."

Mr. Justice *Heath*.—"I am of the same opinion. The owner of a ship, when he makes an insurance, cannot know the orders of the Admiralty respecting convoys."

Mr. Justice *Rooke*.—"The ground stated at the bar seems to me to be more fit for the jury than the Court, and the jury have found that the convoy was sufficient."

Lord Chief Justice *Eyre*.—"I am satisfied with the finding of the jury,"

The rule for a new trial was therefore refused.

32 Geo. 3. The sailing with convoy has added so much to the security of our commerce in time of war, that in the year 1798, an act of parliament passed for the purpose of compelling ships to sail with convoy, and by which also a considerable revenue was intended to be raised.

The first section of this act provides, that it shall not be lawful for any ship or vessel belonging to any of his majesty's subjects (except in-after is excepted) to sail or depart from

any port or place whatever, unless under the convoy and protection of such ship or ships as may be appointed for the purpose. C H A P.
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That the master or other person having the charge or command of every such ship or vessel, which shall sail or depart under the protection of convoy, shall and is thereby required to use his utmost endeavours to continue with such convoy during the whole of the voyage, or during such part thereof as such convoy shall be directed to accompany and protect such ship, and shall not wilfully separate or depart therefrom upon any pretence whatever, without order or leave for that purpose from the officer having the command of such convoy. Sect. 2.

It is also enacted that if the master or commander of any ship which is by this act required not to sail without convoy, shall sail without convoy; or having sailed with convoy shall wilfully depart therefrom, without leave first obtained from the person entrusted with the charge of such convoy, every such master shall forfeit 1000*l.* and in case the whole or any part of the cargo consisted of naval or military stores, the penalty is 1500*l.* with a power in the Court, where the action may happen to be brought, to mitigate the penalties, so as they are not reduced to a less sum than 50*l.* Sect. 3.

By section the fourth, it is provided that in case of a sailing without, or a wilful desertion of, convoy, every insurance or contract or agreement for any insurance upon such ship, or goods, wares or merchandize laden thereon, or upon any property, freight, or other interest arising out of the same, whereon insurances may lawfully be made (and which shall be the property of the master or commander of the ship, so sailing without convoy, or wilfully quitting the same, or of any person interested in such vessel or cargo, who shall have directed, or been any way privy to, or instrumental in, causing such ship or vessel to sail without convoy, or wilfully to separate therefrom), shall be null and void, to all intents and purposes both at law and in equity, any contract or agreement to the contrary notwithstanding; and that nothing shall be recovered thereon by the assured for loss or damage, or for the premium, or consideration premium, which shall have been given for it Sect. 4.

C. H. A. P. XVIII. if any party to such insurance, or any broker or other persons shall transact a settlement on such insurance, or allow any money in account, on such insurance, every such person shall forfeit 200*l*.

Sec. 5. It is also provided, that the officers of the customs shall not permit vessels to clear outwards, till they have given bond, with one surety, in the penalty of the value of the ship, with condition that the ship shall not sail without, nor wilfully desert the convoy.

Sec. 6.
28 June
1798.
A fore gn-
built ship,
British own-
ed, is not re-
quired to be
registered,
and may
therefore sail
without con-
voy, being
within the
exception in
this clause
of the sta-
tute. Long
v. Duff,
2 Rot. &
Pull. 209.
Sect. 8.

By the sixth section, this act is not to extend to vessels, not required to be registered by any acts then in force; nor to any ship, having a licence signed by the Lords of the Admiralty to sail without convoy, or by such persons as shall be duly authorized by them for that purpose; or to any ship proceeding with due diligence to join convoy from the port or place at which the same shall be cleared outwards, in case such convoy shall be appointed to sail from some other port or place, except as to the bond hereby required to be taken upon the clearance outwards; or to any ship bound to or from any port in *Ireland*; or to ships bound from one port to another in *Great Britain*; nor to ships in the service of the *East India*, or *Hudson's Bay*, companies.

By the eighth section, the act is not to extend to ships sailing from foreign ports, in case no convoy is appointed by the Lords of the Admiralty of *England*, or persons authorized by them at such foreign ports to appoint convoys, or to grant licences for sailing without convoy.

Sec. 9. The Lords of the Admiralty are to give notice in the *Gazette* that masters of ships shall have on board, flags and vanes for the purpose of distinction, and of answering signals; and without having which they are not to be cleared outwards.

Sec. 10. So much of the act of the 33 *Geo. 3.* ch. 66. sec. 8. as makes the masters of ships under convoy liable to be articted in the Court of Admiralty for disobeying signals or other lawful commands of the commodore, or deserting convoy, and finable at the discretion of the said court, in any sum not exceeding 500*l*. shall be in force, and shall be punishable by imprisonment, not exceeding one year. shall

be painted on a board, and affixed on some conspicuous and convenient part of every ship which by this act is required not to sail or depart without convoy; and that in default thereof every master or other person, having the charge or command of any such ship, shall forfeit, for every such offence, the sum of 50*l*.

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The eleventh section directs, that if any ship, required by this act not to sail without convoy, shall be in imminent danger of being taken by the enemy, the commander of the ship shall make signals by firing guns to convey information of his danger to the rest of the convoy, as well as to the ships of war under the protection of which he is sailing; and that in case he is taken possession of, he shall destroy all instructions confided to him, relating to the convoy; and every commander wilfully neglecting to make such signals, or to destroy such instructions, shall, for every such offence, forfeit a sum not exceeding 100*l*.

SECT. 11.

The remainder of this statute is employed in directing how the duties shall be raised and collected.

The third and last species of warranty, which falls under our consideration, is that of neutrality; or that the ship or goods insured are neutral property. This condition is very different from either of the two former; for if this warranty be not complied with, the contract is not merely avoided for a breach of the warranty, but it is absolutely void *ab initio*, on account of fraud. This ground was entered upon in the chapter of fraud; and the principle, on which the difference turns, is this. A man may warrant that his ship shall sail with convoy; and if that condition be not complied with, it is not his fault, because it depends upon the acts of other men: but still he is the sufferer, for he loses the benefit of his contract. So also if he warrant to sail on a particular day, and do not, he is guilty of no crime; for that was a circumstance, the performance of which depended on a thousand accidents, such as wind, weather, repair, &c.: but as he had expressly undertaken, he loses the effect of his policy by non-compliance. But in neither of these cases, as I have said, is the insured, making such a warranty, guilty of any offence. Not so with him, who warrants property to be neutral. That is a fact, which, at the time of insuring, must be with his own knowledge; and if he assert it to be neutral, knowing

Vide c. 10.

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to be otherwise, he is guilty of a wilful and deliberate falshood, and incurs moral turpitude. In such a case, therefore, the contract between the parties is absolutely null and void to all intents and purposes.

Woolmer v.
Mullman,
4 Burr.
1419.
3 Blac. Rep.
427. Vide
ante, p. 244.

Thus on a special case reserved for the opinion of the Court, it appeared that an action was brought for the recovery of a total loss on a policy of insurance made on goods, on board the ship *Bona Fortuna*, at and from *North Bergen* to any ports or places whatsoever, until her safe arrival in *London* "*warranted neutral ship and property*." The ship, with the goods so being on board her, after her departure from *North Bergen*, and before her arrival at *London*, proceeding on her voyage, was, by force of the winds, and stormy weather, wrecked, cast away, and sunk in the seas; and the said goods were thereby wholly lost. The ship called *La Bona Fortuna*, at and before the time she was lost, *was not neutral property*, as warranted by the said policy. The question was, Whether under such circumstances, the plaintiff could recover? Lord *Mansfield*, after hearing counsel for the plaintiff, stopped those for the defendant, saying, the point was too clear to be argued. There was a falshood, with respect to the thing insured; for he insured neutral property, when it was not so: therefore there *is no contract*. We must give judgment for the defendant.

Tabbs v.
Bendelack,
Sitt. after
Tr. 1801.
4 Esp. 108.
and 3 Bos.
& Pull.
1807. note.
B. C.

An *American* by birth, who has resided for some years with his family in *England*, though himself has been occasionally in *America*, is so far to be considered as a *British* subject, that if a ship of his be warranted *American* property it is not to be deemed so, though the vessel was built in *America* and registered there, and such a plaintiff in an action upon a policy of insurance was nonsuited.

If, however, the ship and property are neutral at the time when the risk commences, this is a sufficient compliance with a warranty of neutral property; because it is impossible for the insured to be answerable for the consequences of a war breaking out during the voyage. The insurer takes upon himself the risk of peace or war; they are public events, equally known to both parties.

The plaintiffs insured the ship the *Yonge Herman Hiddinga*, and her cargo, "at and from *L'Orient* to *Rotterdam*, warranted a "neutral ship and neutral property." The ship being captured in the course of her voyage by some *English* men of war, the plaintiffs brought this action against the defendant, one of the underwriters on the policy, stating in their declaration, that the defendant subscribed the policy on the 28th of *November* 1780, and averring that the ship and cargo were at that time, neutral property. The trial came on before Lord *Mansfield* at *Guildhall*, when a verdict was found for the plaintiffs, subject to the opinion of the court upon a case stating, that the ship in question sailed from *L'Orient*, on the voyage insured, on the 11th of *December* 1780, having the insured cargo on board, and both the ship and cargo were neutral property at the time of the ship's departure from *L'Orient*, and so continued until the 20th of *December* 1780, on which day hostilities having commenced between the *English* and the *Dutch*, the *Dutch* ceased to be a neutral power, and the ship and cargo ceased to be neutral property. They were taken on the 25th of *December* 1780, and condemned as lawful prize, in the Admiralty court, on the 19th of *February* 1781.

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Eden and
another v.
Parkinson,
Doug. 732.

Lord *Mansfield*.—"Many points have been gone into in the argument on both sides at the bar, which are not necessary for the decision of this case. For instance, there is no doubt but you may warrant a future event. But the single question here is, What is the meaning of this policy? I had not a particle of doubt at the trial, and I know the jury had none; but Mr. *Lee* pressed for a case; and I granted one out of respect to him. What is the case? It is an insurance upon a ship and her cargo, at and from *L'Orient* to *Rotterdam*. The insured warrant them neutral, and the defendant would have the court to add, by construction, "and so shall continue during the whole voyage." The contract is not so. The insured tell the state of the ship and goods then, and the insurers take upon themselves all future events and risks, from men of war, enemies, detentions of princes, &c. The parties themselves could not have changed the nature of the property; but they did not mean to run the risk of the war. If it made a difference what country the property belonged to, the underwriters should have enquired. The risk of future war is taken by the underwriter of every ship. By an implied warranty every ship must, at the time, stand

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Vide ante,
c. 11.

Vide supra.

strong; but it is sufficient if she be so at the time of her sailing. She may cease to be so in twenty-four hours after her departure, and yet the underwriter will continue liable. The case of *Lilly v. Ewer* turns quite the other way. The decision there was, that the ship must sail with convoy, according to the usage of the trade; that is, convoy destined to go as far as usual in that voyage. The present is the clearest case that can be. The warranty is, that things stand so at the time; not that they shall continue."

Mr. Justice *Willes* and Mr. Justice *Asbhurst* concurred.

Mr. Justice *Buller*.—"The case of *Lilly v. Ewer* is much against the defendant, for it was not contended there that the ship must continue with the convoy during the whole voyage." The *posse* was delivered the plaintiffs.

Vide infra.

And afterwards in a subsequent case of *Saloucci v. Johnson*, in the course of the argument, Mr. Justice *Buller* said; I do not agree with the counsel, who contend, that the property must continue neutral during the whole voyage: if it be neutral at the time of sailing, and a war break out the next day, the underwriter is liable.

Tyson and
another v.
Gurney,
Term Rep.
27.

And in a still later case, which came on for trial before Lord *Kenyon* at *Guildhall*, this point was one amongst others saved for the opinion of the Court of King's Bench. But when the case came on to be argued, the counsel for the defendant abandoned the objection upon the authority of *Eden v. Parkinson*; and *Saloucci v. Johnson*; so that this point may now be considered as for ever closed.

Having seen what shall be deemed a compliance with a warranty, asserting that the property insured is neutral; and having also considered what effect the breach of such a warranty has upon the contract of insurance; it may be proper to observe, before this chapter is closed, how far our courts of law hold the sentences of foreign courts to be conclusive evidence, that the property was not neutral; so as to discharge the underwriters.

Before we proceed to the consideration of the effect of their sentences, it is proper to observe, that the foreign courts here

alluded to, the sentences of which are in any case to be held conclusive, must be such courts as are constituted according to the law of nations, exercising their functions within the belligerent country; a court of that state, to which the captor belongs, held within its own territories. If therefore a *British* ship be captured by a *French* privateer, and carried into *Bergen in Norway*, a neutral state, and there condemned by the *French* consul, the sentence is contrary to the law of nations, and illegal; and if after such a sentence, the owner re-purchase his ship at a publick auction, he cannot recover the re-purchase money from the underwriter. Such a contract is in the nature of a ransom, and illegal. The court of King's Bench, in deciding the above point, said, it was a question affecting all commercial states, and the point had lately been solemnly decided by Sir *William Scott* (the Judge of the High Court of Admiralty), upon grounds that would recommend the decision to all those who filled judicial situations (a).—It is certain, indeed, that the decision of a *French* consul in a neutral country can only be considered as the act of a person destitute of all authority, except over the subjects of his own country,* and possessing that, merely by the indulgence of the country in which he resides; and who can have no pretence to exercise a jurisdiction in that neutral country in any matter, particularly in the matter of prize of war, in which the subjects of other states may be concerned.

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Haveock v.
Rockwood,
8 Term Rep.
268.

See the case
of *Flad*
Open Dr.
Robinson
Capt. in the
Admiralty,
v. 1. p. 155.

But sentences of condemnation procured by the captors in the country of a co-belligerent, or ally in the war, have been held to be good.

Oddy v.
Bovill,
2 East's
Rep. 473.

But of the sentences of foreign courts of Admiralty, duly constituted, the courts of justice in *England* will take notice; and if they have proceeded to decide the question of property will be held to be conclusive.

Hughes v.
Cornelius,
2 Show. 232.
2 Ld Raym.
893. 936.

(a) It was my intention to have inserted the very learned judgment of Sir *Wm. Scott*, in the case of the *Flad Open* at length: but I forbear to do so, as it is now published at length in the 8 Term Rep. p. 270. note (a); and also a full report of the cause in *Dr. Robinson's* late valuable and accurate Reports of Cases argued and determined in the High Court of Admiralty. See also the case of the *Christopher*. 2. Rob. 209. and the case of the *Betty, Kruger*. 2 Rob. 210, n. for the distinction between a condemnation in a neutral country, and one in the country of a co-belligerent, and which distinction was adopted by the Court of King's Bench in the case of *Oddy v. Bovill* mentioned in the

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In the first case as to the effect of foreign sentences upon the contract of insurance and warranties therein contained, it was held, that the sentence of condemnation by a foreign court of Admiralty is not conclusive evidence, that the ship was not neutral; unless it appear that the condemnation went upon that ground: consequently the underwriter remains liable. A sentence of a court of Admiralty binds all the world, as to every thing contained within it; but where the cause of condemnation does not appear to be on the specific ground material to the point in issue, evidence must be admitted in order to explain it.

Bernard v.
Motteux,
Doug. 575.

Insurance of freight and goods was made upon the ship the *Jane* (or *Joanna*) at and from *Venice* to *London*, "warranted" "neutral ship and neutral property." The cause was tried before Lord Mansfield, at Guildhall, when a verdict was found for the plaintiff, subject to the opinion of the court, upon a case which stated as follows: That the defendant underwrote the policy; that the ship was taken by a *French* frigate, called *La Magicienne*, as she was sailing from *Venice* on her voyage to *London*; that the plaintiff offered to give evidence on the trial, that the property of the ship and the property of the cargo were neutral; and that the papers belonging to the ship fell overboard by accident, after she was brought to by the *French* frigate: but the defendant objected to such evidence being received; and he produced as the ground of his objection the sentence of the condemnation of the ship in the *French* Admiralty Court, which was read, and is as follows:

Almeria,
The Joanna-
re ss.

"Louis Jean Marie de Bourbon, Duke de Penthièvre, Admiral of France. Seen by us, the *procès verbal*, made on board the snow *Joanna*, taken by the king's frigate *La Magicienne*, commanded by M. De Boades, dated the 2d of December last. Signed Saint Owey, steward, Bouret, Dominico Zané Seen by the captain commander. Signed Boades;—purporting that he said 2d of December last, at five o'clock in the evening, his said majesty's frigate, *La Magicienne*, commanded by the aid captain De Boades, being ten leagues east of Cape de Mouines, having discovered a snow steering south-south-west, the wind south-west, and having come up with her, and stopt her, under Venetian colours, after an hour's chase, the said M. De

“ *Boades* ordered the captain to bring on board his muster roll, C H A P. XVIII.
 “ passport, and bills of loading ; with which order the captain
 “ did not readily comply, under a pretence that the sea was
 “ rough, and that his long-boat was leaky ; but, being at last
 “ obliged to comply, upon threats being made of firing on him,
 “ and being come on board, he declared, *that, in getting up the*
 “ *ship's side, the box containing his muster-roll, his patents, and*
 “ *passport, had fallen from his pocket into the sea, and only shewed*
 “ his bills of loading ; by which they found the said snow, the
 “ *Joanna*, of 14 men, including officers, commanded by *Domi-*
 “ *nico Zané of Venice, sailed from Venice the 25th of September,*
 “ *with a cargo of 12 bales of silk, dried raisins, oil, &c. and*
 “ other effects mentioned in the bills of loading by him exhi-
 “ bited, for the account of sundry persons in Venice, consigned to
 “ sundry persons in London, whither he was bound. These goods
 “ going into an enemy's country, and the loss of his papers, which
 “ had fallen into the sea, raising suspicions ; the said snow had been
 “ stopped, and carried by his majesty's frigate, *La Magicienne*,
 “ to *Almeria*, where she had been put into the hands of the
 “ consul, after the said *Saint Owey*, lieutenant, acting as steward,
 “ and the said *Bouret*, ensign on board the said frigate, had put
 “ their seal on the said snow, where they found no papers ; and
 “ taken on board the said ship ten of the said snow's crew, which
 “ were replaced by six men from on board the *Magicienne*, and
 “ three from the *Atalante*, with a coasting pilot, who have
 “ brought the said snow into the port of *Almeria*. The premises
 “ considered, We, by virtue of the power delegated to us as
 “ aforesaid, have declared, and declare, as good prize, the ship
 “ the *Joanna*, her tackle, and apparel, together with the goods
 “ of her cargo, and do adjudge them to the captors ; that, in
 “ consequence of this decree, the whole be sold (if not already
 “ done) in the usual manner, and the produce divided according
 “ to the desire and ordinance of the king ; made the 28th of
 “ *March 1778*. We order, by these presents, the vice consul
 “ of *France*, at *Almeria*, to look to the execution of this our
 “ ordinance ; and hereby authorize and command the first tip-
 “ staff, or serjeant, to proceed in all forms requisite thereto.
 “ Done at *Paris* the 13th of *January 1779, Rigot.*” The
 question stated for the opinion of the court was, Whether the said
 sentence was not conclusive evidence against the plaintiff's re-
 covering in this action ? In the course of the arguments,

C H A P. XVIII. third article of the regulations of the marine of *France*, bearing date the 26th of *July* 1778, and also the *procès verbal*, made at the time of the capture, though not stated in the case, nor given in evidence at the trial, were so much referred to, and seemed of such weight to the court, that it will be necessary to insert them in this place. *Arret for the regulation of the marine, &c.* 26th *July* 1778. Art. 3. “All vessels taken, of what nation soever, either neutral or allied, from which it is known that any papers have been thrown into the sea, suppressed or abstracted, shall be declared good prize; together with their cargoes, upon the mere proof, that some papers have been thrown into the sea, without any necessity of examining what those papers were; by whom they were thrown; and even though a sufficient quantity should remain on board to justify that the ship and the cargo belonged to friends or allies.” The *procès verbal* need not be here repeated; for although it is not substantively set out in the case, yet it is copied almost *verbatim* in the sentence of the *French* Admiralty. It was admitted at the bar, that the sentence had been appealed from, and had been affirmed; but nothing new or special appeared in the proceedings on the appeal. This case was twice argued at the bar; and after the second argument, the Court desired that it might stand over, in order to give time to apply to the defendant for his consent; that the above *arret* and the *procès verbal* should be added to the case. To this proposition the defendant would not consent.

Lord *Mansfield*, upon the first argument said:—“The first principles are clear and admitted. All the world are parties to a sentence of a court of Admiralty. Here there is a monition published at the Exchange; and in other countries, at some place of general resort; and any person interested may come in and appeal at any time, if there has been no *laches*. If there has, the time of appeal is limited. But the sentence, as to that which is within it, is conclusive against all persons, unless reversed by the regular court of appeal. It cannot be controverted collaterally, in a civil suit. The difficulty here is, what the ground was, on which the *French* Admiralty went; whether the ground of enemy's property, or that of the papers having been thrown overboard. By the maritime laws of all countries, throwing papers overboard is considered as a strong presumption of enemy's property; and upon that principle the *arret* of 1778,

is founded. But in all my experience in *England*, I have never known a condemnation on that circumstance only. It is made use of as a strong ground of suspicion. The *arret* is very rigid. It is difficult to find out what the ground of this sentence was. I incline to think the Court went upon the ground of *enemy's property*, and considered the want of the papers as a strong presumption of that fact; but they did not examine the captain upon interrogatories, as to the contents of the papers; and, upon the whole, enough does not appear on this obscure sentence, to ascertain precisely on what it was founded, and some other method ought to be taken to enquire what the ground of it was. As to whatever it *meant* to decide, we must take it to be conclusive."

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Willes and *Ashurst*, Justices, concurred with his Lordship.

Mr. Justice *Buller* inclined to doubt, and said:—"To be sure, the sentence was obscure, but, taking it altogether, he did not think there was much difficulty in discovering the grounds of it. The two circumstances, of the cargo being consigned to the enemy, and the falling of the papers into the sea, are stated as the grounds of suspicion. The latter circumstance,—papers falling into the sea,—could not be a ground of condemnation. The other could raise no other suspicion, nor a presumption of any thing else, but the property being enemy's property. It follows therefore, that the condemnation went upon that ground. If it had gone upon a *wilful throwing of papers overboard*, that would have been stated substantively as the ground. In the first place, lay the *arret* out of the case; and then wilful throwing papers overboard is only presumptive evidence of enemy's property. Then take the *arret*, still wilful throwing overboard might have been used as evidence of enemy's property, or it might have been a substantive ground under the *arret*: here it is not stated as a substantive ground."

Lord *Mansfield*, after the second argument, said; that if the *procès verbal* should be agreed to be made part of the case, it would clearly explain the ambiguity of the sentence; as it set forth the ground for taking the ship to have been the *arret* of July 1778. Without the *procès verbal*, he said, the sentence was equivocal; it took all in; and it was difficult to say what it went on. If the papers produced to the captor were fair, the

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property was neutral. But the *procès verbal* put the ground of the sentence out of all doubt.

Mr. Justice *Buller* also declared, that he thought the *procès verbal* must be taken as part of the proceedings, and, as that expressly referred to the *arret*, as the ground of the capture, and the sentence was consistent with it, the sentence must be taken to be founded on the *arret*. But he adhered to his former opinion, on the case as stated without the *procès verbal*, namely, that the interpretation of the sentence, taken, by itself, must be, that the condemnation went on the ground of enemy's property, and was, therefore, conclusive against the plaintiff.

The final refusal of the defendant was signified by Mr. *Lee*, who assigned as a reason for it, that the *procès verbal* was not a proceeding in the *French* court of Admiralty, but merely an account of what passed on the capture, reduced into writing, at the time. He also observed, that, in the sentence, all the *procès verbal*, except the concluding part, which refers to the *arret* of July 1778, was recited, and this afforded a strong argument for inferring, that the Court had purposely omitted that part of it, to shew that they did not condemn the ship on the ground of the *arret*.

Lord *Mansfield* disapproved much of the defendant's refusal, but he said, he thought the justice of the case might still be got at, on the ground of the ambiguity of the sentence, which did not mention a word about the property being enemy's property; that it was clear the *French* Admiralty meant to proceed on the ground of throwing the papers overboard: and he agreed with the counsel for the plaintiff, that the *procès verbal* ought to be considered as part of the proceedings, and that the sentence ought not to have been read without it.

Mr. Justice *Buller* thought there was weight in what had been observed by Mr. *Lee*, on the reason for omitting the concluding part of the *procès verbal* in the sentence. Indeed, it was not clear that what was now offered to be produced, was the same *procès verbal* which the sentence recites; and if it could be supposed that the captain had made another, omitting the reference to the *arret* as the ground of the capture, that could only be accounted

for, by his having found that the capture could not be supported on that ground. C H A P.
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Mr. Justice *Willes* thought it most manifest, that the *procès verbal* made at the time of the capture was that on which the sentence proceeded. The sentence began with mentioning it, and recited it exactly, as to date, and every thing else, as far as it went. The word *purporting* did not require a recital of the whole; and it was not necessary for the Admiralty Court to set forth the captain's reasons for detaining the ship. He had all along been of opinion, that the sentence was so ambiguous, that it did not appear that the cause of condemnation was that the property was neutral, and therefore had thought evidence necessary to explain it.

Mr. Justice *Asbhurst* concurred, as to the ambiguity of the sentence, and that it was, therefore, not conclusive; and on that ground, Lord *Mansfield*, and *Willes* and *Asbhurst*, Justices, declared their opinion that the *possea* ought to be delivered to the plaintiff. *Lee* still urged the danger of opening the sentences of foreign courts of Admiralty, which are generally informal; upon which Lord *Mansfield* said, all the supposed inconvenience would be obviated, if the foreign courts would say in their sentences, "*Condemned as enemy's property.*"

In the case just reported, it is admitted by all the judges, that a sentence of a Court of Admiralty abroad is binding upon all parties, as to what appears upon the face of it. And therefore if it appear evident, without a possibility of doubt or ambiguity, that the sentence proceeded upon the ground of the property not being neutral, that is conclusive evidence against the insured, that he has not complied with his warranty; and consequently the underwriter is no longer responsible. This was fully settled in the case of *Barzillay v. Lewis*. Baring v.
Claggett,
3 Bos. &
Pull. 201.
and Baring
v. Christie,
5 East's Rep.
398. Acc.

It was an action on a policy of insurance on a ship from *Liverpool* to *Amsterdam*, warranted *Dutch property*; and it was brought to recover for a total loss, the ship having been captured by the *French*, and condemned by the court of Admiralty there. The plaintiff (the insured) was nonsuited in this action, from an idea, that the decree of the parliament of *Paris* was decisive against him, that he had not complied with his warranty. Upon a motion to set aside this verdict, the following Barzillay v.
Lewis, B.R.
Trin. Term,
21 G3

C H A P. facts appeared from the report of the judge who tried the cause :
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The ship in question was originally a *French* privateer, called *L'Aimable Agathée*, which was taken by an *English* privateer, and carried into *Liverpool*, condemned in *England*, and she then got the name of *The Three Graces*. A merchant at *Liverpool* afterwards bought her for a house at *Amsterdam*, and a passport was sent for her from thence. She was then insured by a *Dutch* name, and warranted as in the policy ; she went to sea, was captured by a *French* ship, and carried into *St. Maloes*, where she was released by the Vice Admiralty Court as being *Dutch*. But upon an appeal to the parliament of *Paris*, the sentence was reversed, and she was condemned as lawful prize, by the name of *The Three Graces of Liverpool*. It appeared in evidence, that there were certain *French* ordinances, which ordain, that where more than one third of the crew of a neutral ship are enemies to the king of *France*, the ship shall be confiscated : that no ship shall be considered as transferred, till she has been within the port of the purchaser ; and that a passport shall be deemed fraudulent, unless the ship has been in the port from whence it has been obtained. The ship's crew in question consisted of sixteen, five of whom were *French*, four were *Danes*, two were *Swedes*, one was *Dutch*, one *Portuguese*, one *Hamburgher*, one *Norwegian*, and one *Irishman*. Some of the crew swore, that they were hired by *Englishmen*, and that both the ship and the cargo were *English*. They also swore, that when the ship which took them came in sight, the captain sailed back towards the *English* coast : but one of the crew having informed him, that the ship in sight carried *English* colours, he resumed his course.

Lord Mansfield.—“ The sentence of the Court of Appeal in *France* is conclusive. The question is, What that sentence means ? She is condemned as not being a *Dutch* ship. The warranty is, that she is *Dutch*, which is false. The law of nations is founded on eternal principles of justice ; and in every war the belligerent powers make particular regulations for themselves. But no nation is, obliged to be bound by them, unless they are agreeable to the general laws of nations ; but all third persons and mercantile people are bound to take notice of them for their own safety. In this case, the plaintiffs warrant this ship to be *Dutch* ; and they must see that she is in such a state as to be en-

titled to all privileges of neutral property. The insurers took the risk upon this warranty; she was insured by her *Dutch* name, and the underwriters take it for granted that she is so: but when the matter is sifted in *France*, she appears to have none of the requisites to shew she was neutral property, for she had never been in a *Dutch* port, and the sea-brief or passport was not conformable to the treaty of *Utrecht*. The parliament of *Paris* did not condemn her as the *Dutch* ship of *Amsterdam* by her *Dutch* name; but as "*The Three Graces of Liverpool*." Indeed she had none of the requisites of a *Dutch* ship; and the regulations require that she should have been into the port of the purchaser, in order to transfer the property; the knowledge of all which circumstances the insured, by his warranty, took upon himself. I am therefore of opinion, that the warranty was false."

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Mr. Justice *Willes*, and Mr. Justice *Asbhurst* concurred.

Mr. Justice *Buller*.—"The first sentence seems to have gone on particular *arrêts*. The second appears to go on the ground of property, for the name is changed, and they do not go into evidence as to the muster-roll or situation of the crew, as to there being more than two-thirds *English*. The other ground is more general, and makes it immaterial whether it was on the one ground or the other; for if she were not so documented as to have the protection of a neutral ship, the warranty has not been complied with." The rule to set aside the nonsuit was accordingly discharged (a).

It has also been determined, that where no special ground at all is stated; but the ship is condemned generally as good and lawful prize, the Court here must consider it as conclusive evidence that the property was not neutral, and will not again open the proceedings of the court abroad in favour of the party, who has warranted his property to be neutral.

An action was brought upon a policy of insurance on goods warranted neutral on board the *Thetis*, a *Tuscan* ship, to recover

(a) In the four first editions a *nisi prius* case of *De Souza v. Esquer* occupied the whole of page 361, but the very learned person who decided that case, having since declined from the Bench, with that candour which always attends great talents, that that decision could not be supported, it is here wholly omitted. See 8 Term R. 444, note (a).

C H A P. the amount of the insurance from the underwriters. The ship
XVIII. had been taken in the course of her voyage by a *Spanish* vessel, carried into *Spain*, and her cargo was there condemned "*as good and lawful prize.*" There was an appeal to a superior court, which reversed the sentence : but upon a further appeal, the latter decision was overturned, and the former confirmed. At the trial of this cause before Lord *Mansfield*, his Lordship being of opinion that the sentence of the *Spanish* Court of Admiralty was conclusive evidence of the falsehood of the plaintiff's warranty, the plaintiff was nonsuited. A motion was made, and fully argued to set aside the nonsuit, which was unanimously refused by the whole Court of King's Bench.

Lord *Mansfield*.—"The policy here warrants that this cargo was neutral property. It appears from the policy itself, that the ship was neutral, because it is called a *Tuscan* ship ; but the warranty is that the goods are neutral. It must be presumed from the condemnation, as no other cause appears, that it proceeded on the ground of the property belonging to an enemy. In the case of *Bernardi v. Motteux*, the decision of the court turned upon the particular ground of the confiscation appearing on the face of the sentence ; and that it did not appear to be on the ground of being enemy's property. This being so, the court gave the party an opportunity to shew by evidence, that the specific ground was really the cause of condemnation. In this case, at *Guildhall*, the counsel admitted the general rule ; but they said, if a copy of the proceedings could be had, a special cause would appear. The proceedings are now come ; and from them it appears, that the question turned entirely upon the property of the goods. For in the second court, to which they appealed from the sentence of the first, the question was, Whether the goods were free ? the decree was, that they were. But the third court overturned the decision of the second. It is sufficient, however, that no special ground is stated ; and therefore the rule must be discharged."

If a foreign Court of Admiralty condemns a ship (warranted *American*) as enemy's property, for not having on board a *role d'equipage* or list of the crew, which is required by a *French* ordinance to be on board the ship, and which the Court of Admiralty adjudged to be requisite within the meaning and construction of the

treaty between the two countries of *France* and *America*, the Court of King's Bench held that the adjudication in *France* was conclusive against the warranty, that she was an *American* ship, though in fact she was so; that point being clearly within the jurisdiction of the foreign Court(a).

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But where there is *no warranty* of being *American*, a sentence adjudging a ship to be good prize, *as belonging to the enemies of the republic*, negatives no fact, which it was incumbent on the assured, having made no warranty, to establish; for the *English* courts are only bound by the decretory, or concluding part of the sentence, and, where the adjudication is on the ground of enemy's property, are not bound to examine the premises that led to the conclusion. If, indeed, there had been a warranty, the adjudication that it was enemy's property would have been conclusive against such a warranty.

Christie v.
Secretary,
8 Term
Rep. 192.

Goods were insured on board the *Hermon*, without any addition of country or place, and not represented to be of any particular country at the time of subscribing the policy, although the broker, when the ship was subscribed, had said, she was an *American*; it was held that, though she was, in fact, an *American*, she need not, under these circumstances, be documented as such to entitle the assured to recover against the underwriters, for a loss by capture, and subsequent condemnation, for want of the documents required by treaty between her own and the capturing state; for she was neither insured as *American*, nor represented to be such at the time when the policy was effected.

Dawson v.
Atty, 7
East's Rep.
367.

If the ground of decision appear to be not on the want of neutrality, but upon a foreign ordinance, manifestly unjust, and contrary to the laws of nations, and the insured has only infringed such a partial law; as the condemnation did not proceed on the point of neutrality, it cannot apply to the warranty, so as to discharge the insurer.

(a) Even where there has been no sentence of condemnation, if a ship is warranted *American*, and sails without such a passport, as is required by the treaty between *France* and *America*, the warranty is not complied with, and the underwriters are discharged; even though the ship suffers no inconvenience from the want of it. Such a warranty does not mean merely that the ship is *American* property, but that she is entitled to all the privileges of an *American* flag.

Rich
Parl
7 Term
Rep. 70.

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Mayne v.
Walter,
B. R. East.
22 Geo. III.

In a policy of insurance, *the ship was warranted to be Portuguese*; and having been taken in her voyage by a *French* privateer, she was carried into *France*. The Court of Admiralty condemned her because she had an *English* supercargo on board. It appeared that there was a *French* ordinance, prohibiting any *Dutch* ship from carrying a supercargo belonging to any nation at enmity with the court of *France*. In an action against the underwriter, these facts appeared; upon which, a verdict was found for the plaintiff, subject to the opinion of the Court, upon this question, Whether the circumstance of having an *English* supercargo was a breach of neutrality; and whether such a sentence was conclusive?

Lord Mansfield.—“It is an arbitrary and oppressive regulation, contrary to the law of nations, and there is no proof that the plaintiff knew any thing of it. If you were both ignorant of it, the underwriter must run all risks; and if the defendant knew of the edict, it was his duty to enquire, if there was such a supercargo on board. It must be a fraudulent concealment to vitiate a policy.” But it is remarkable that neither party has said any thing of the treaties between *France* and *Portugal*; neither party seems to know any thing about them, and yet the whole case turns upon them.” Judgment for the plaintiff (a).

The case just reported has undergone a variety of discussion in *Westminster-hall*, and has lately received most ample confirmation in two or three cases, which shall be mentioned in their order; and by which the principle seems fully established, that if the sentence of the Court of Admiralty has not decided the question of property, and has not declared, whether it be neutral or not, the insured, who has warranted his property to be neutral, shall not be precluded from recovering against the underwriters, although the foreign Court of Admiralty has condemned the property as prize, for having violated some of their ordinances.

The first of these cases was an insurance on goods on board the ship *Juliana*, “warranted a *Dane*,” on a voyage from *London* to *Teneriffe*, with liberty to touch at *Guernsey* and *Madeira*,

(a) So if a ship be restored, but damages and costs denied to the claimants, because they had not fully complied, as to their documents, with certain *French* ordinances, the assured may recover for the detention notwithstanding.

for account of persons resident at *Teneriffe*; and the loss was declared to be by capture. At the trial, a verdict was found for the plaintiff, subject to the opinion of the Court upon a case, which stated, that the ship *was a Danish ship*, and the property of *Danish subjects*, and previous to the voyage insured, had a passport signed by the king of *Denmark*, for a voyage from *Copenhagen* to ports in the *East Indies*. *Eggleston*, the captain of the ship, sailed from *Copenhagen* on the 23d June 1796, having on board a cargo of tar, pitch, &c. and arrived in the *Thames*, according to verbal orders from his owners, 23d July 1796. During his stay he took on board goods for the owners, besides those in question, and having taken out clearances for *Madeira* and *Guernsey*, sailed, arrived at the latter place, and after sailing from thence, was captured by a *French privateer*, and carried into *Bordeaux*. At the time of the capture, and during the whole voyage, the *Juliana* had on board the passport and every other document usually carried by *Danish ships*. She had also a *role d'equipage*, containing the names and places of nativity of the officers, but not of the crew, only stating the latter generally to be sixty men of colour. Captain *Eggleston* was born in *Scotland*, of *British* parents. He was not naturalized in *Denmark*; but on the 6th of *October* 1794, posterior to the war between *England* and *France*, he obtained letters of burghership in *Denmark*, but had no domicile, never having resided there.

Proceedings were instituted at *Bordeaux*, before the Tribunal of Commerce, which condemned the ship and cargo, except one bale, belonging to the captain, as prize. From this sentence Captain *Eggleston* appealed to the Civil Tribunal of *La Gironde*, where there was a general sentence of condemnation. These sentences referred to several *French* ordinances, particularly the one alluded to in *Mayne v. Walter*, of 1778, by which it is declared, that all ships shall be confiscated "wherever there shall be found on board a supercargo, merchant, commissary, or chief officer, being an enemy." It is not necessary to state these sentences, because the Court of King's Bench were of opinion, that the effect of those sentences, and particularly of the ultimate sentence now to be mentioned, was to condemn, not on the ground that the property was not neutral, but because the circumstance of the captain's being a *Scotchman*, was a violation of this ordinance. From the two former sentences, the captain

C H A P. XVIII. appealed to the Supreme Tribunal of Cassation at *Paris*, which decreed as follows: "Having heard the parties, the Tribunal considering that it has been fully proved, by the confession of Captain *Eggleston*, and ascertained by the judges of *La Gironde* that the said Captain *Eggleston* was born in Scotland, and an enemy; that his denization in a neutral country was not justified according to law; that his quality of enemy sufficed to legitimate the prize; that the fact of captain *Eggleston* being a Scot and an enemy, existed independently of the papers on board; that in consequence all remedies of nullity drawn either from the withdrawing of some of the papers on board, or from the non application of the seal to the bag wherein they were inclosed, cannot give any ground to cassation; rejects the request of Captain *Eggleston*, and condemns him to the fine of 150 francs." After this case was twice argued,

Lord *Kenyon* C. J. said—"This is an action on a policy of insurance on goods on board a ship warranted to be a *Danish* ship: a loss having happened, the defendant resists the plaintiff's claim, because (he says) the ship in question was not, what she was warranted to be, *Danish*: and I agree with the defendant, that the meaning of the warranty was, not merely that the ship was *Danish* built, but that she ought to be so circumstanced, during the voyage, as a *Danish* ship ought to be. This does not appear to me to be a case of difficulty though it is of great importance to the public. This is one of the numberless questions that have arisen in consequence of the extraordinary sentences of condemnation passed by the Courts of Admiralty in *France* during the war. I do not think they were characterized too strongly at the bar, when it was stated they all proceeded on a system of plunder: but still until the legislature interferes on this subject, we sitting in a court of law are bound to give credit to the sentences of a competent jurisdiction. If therefore in this instance the French Courts had condemned this ship on the ground that it was not *Danish* property, we should have been concluded by that sentence in this action, and must (however reluctantly, it being stated as a fact in the beginning of the case, that it was a *Danish* ship,) have given judgment for the defendant. This is proved by the different cases cited in the argument, with the decisions in which I concur, and it is supported by reason. To a question asked in the

course of the argument, What are the rules by which Courts of Admiralty profess to proceed? I answer, the law of nations, and such treaties as particular states have agreed should be engrafted on that law. It was said, however, by the defendant's counsel, that an *arrêt* has the same force as a treaty: but, without stopping to enlarge on the difference between them, it is sufficient to say, one is a contract made by the contracting parties, and the other is an *ex parte* ordinance made by one nation only, to which no other is a party; and I concur with Lord *Mansfield* in opinion, that it is not competent to one nation to add to the law of nations by its own arbitrary ordinances, without the concurrence of other nations. That is the ground, on which this case must be decided. Now let us see what was the foundation of the condemnation in the *French* courts? It is stated in one of the sentences, that, by their own ordinances, all ships are to be confiscated, "whensoever on board these ships shall be found a "supercargo, merchant, commissary, or *chief officer, being an enemy.*" But I say, they had no right in making such an ordinance to bind other nations. *Then was the ship in question condemned on the ground that she was not Danish property?* Certainly not. A vast variety of circumstances wholly irrelevant, are set forth in the sentences: but it appears, beyond all doubt, that *the ship was at last condemned on the ground that the captain was one of those persons whom by their own ordinance only, they wished to proscribe.* This case cannot be distinguished from that of *Mayne v. Walter*; though even without the authority of that case I should have had no hesitation in deciding in favour of the plaintiff. *On the whole, therefore, I am of opinion, that though, if contrary to justice, the ship had been condemned simply because she was not a Danish ship, we should have been excluded by that sentence, yet as the Courts abroad have endeavoured to give other supports to their judgments which do not warrant it, and have stated as the foundation of the sentence of condemnation, one of their own ordinances, which is not binding on other nations, this sentence does not prove that the ship in question was not a neutral ship; and consequently the plaintiff is entitled to recover."*

Grose J.—"This is an action brought on a policy of insurance to recover the amount of a loss stated in the declaration. The plaintiff proved his interest, and the loss, and *prima facie* proved that the ship was *Danish*. The defence to the action is, first,

C H A P. XVIII. that though it is stated the ship was *Danish*, she was in truth the property of an enemy, and therefore not neutral; and secondly, that she had not documents on board to prove that she was neutral. With regard to the first, it is not only not stated as a fact, nor to be collected by inference that she was not a neutral ship, but it is *expressly* stated as a fact in the former part of the case, that *the ship was a Danish ship* and the property of *Danish* subjects. If this had been found as a fact on a special verdict, it would have been conclusive, and we could not have inferred the contrary from the sentence; but referring to the sentence, it comes to this, that it there appears that the ship was a *Danish* ship, unless the circumstance of the captain's having been born in *Scotland* is evidence to shew that it was not a *Danish* ship: but I find nothing to warrant that either in our own law or in the law of nations. In the case of *Mayne v. Walter*, the Court of Admiralty in *France* condemned the ship, because she had an *English* supercargo on board, which was contrary to one of the *French* ordinances: but this Court did not consider, that the circumstance of a neutral ship having on board an *English* supercargo was a breach of neutrality. *So here this ship having on board a native of Scotland is no proof that the ship in question was not neutral.* As to the second question, if the ship had been condemned for not having the proper documents on board, we must have decided for the defendants. But it appears by the case, that in point of fact she had "every document usually carried by "*Danish* ships." I admit that if the ship had been condemned generally as a lawful prize, our law would have considered that as a denial of her neutrality; or if the ground of the sentence of condemnation had been that the ship was not neutral, that also would have been conclusive in this action. But by referring to the last sentence which I consider as the sentence of *dernier resort*, it evidently appears, that she was condemned because the captain was born in *Scotland*, and an enemy. My opinion then on the whole is, that as the ground of the sentence of condemnation was an infringement of an ordinance of one state, it does not appear by that sentence that the ship was not, what the jury found her to be, a *Danish* ship, or that she was condemned for having, by an act contrary to the law of nations, forfeited her neutrality."

Insurance J.—"The question is, Whether the sentence has ~~annulled~~ the warranty of neutrality? The warranty of neutrality

does not induce any necessity to comply with the peculiar regulations of the belligerent powers. For if a ship be captured, and the question be, whether she be neutral or not, the general rule for judging and deciding on that point is the law of nations, subject to such alterations and modifications, as may have been introduced by treaties: but where the law of nations has not been varied or departed from by mutual agreement, that is the general rule for deciding all questions on matter of prize. This is clearly laid down in a state paper signed by Sir George Lee, Dr. Paul the King's Advocate, and Sir D. Ryder and Mr. Murray then Attorney and Solicitor General, in answer to the *Prussian* memorial concerning neutral ships (a). When therefore a state in amity with a belligerent power has by treaty agreed that the ships of their subjects shall only have the character when furnished with certain precise documents, whoever warrants a ship, as the property of such subject, should provide himself with those evidences, which have by the country to which it belongs been agreed to be the necessary proof of that character. In requiring this, no difficulty is imposed, of which the assured is not aware, and which may not be in his power to prevent: but to require of him to furnish himself with every document the belligerent powers may require, and to insist that the warranty is not complied with, unless the ship be navigated according to their ordinances and regulations, would be to deprive the assured of his indemnity for the want of papers, &c., of the necessity of which he may fairly be presumed ignorant, and which papers it may not be in his power to procure: for how can the officers of one country be called on to grant that, which the laws of their own country do not require? These French decrees are regulations made with some view to the laws of France, but are not applicable to the subjects of any other country. In examining the cases decided on this point, it will not be found that there is any determination of the court to support what has been insisted on by the defendant: but on the contrary it has been settled in many cases, that a condemnation, on the particular ordinances of a belligerent power is no violation of a warranty of neutrality. In the case of *Bernardi v. Motteux* the ship *Joanna* was warranted neutral; the only doubt was, whether the ship were condemned as being the

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(a) Vide *Colleganea Juridica*, 1 vol. 33. and 2d *Postlethwaite's Dictionary*, 715. article *Subsidia*.

C H A P. XVIII. property of an enemy, or for violating a *French arrêt* by throwing papers overboard ; for the one or the other of those causes she was condemned. If she were condemned for the first, namely, that she was not neutral, the plaintiff clearly could not have recovered : nor could he have recovered if she were condemned on the other ground, according to the argument of the defendant in this case : but it is clear, that the court did not, in that case, adopt the defendant's argument here, because the plaintiff did recover in that case, it not being certain that the ground of condemnation was, that the ship was the property of an enemy. [The learned Judge here also commented on the case of *Barzillay v. Lewis*, *supra*, 469. and on *Salucci v. Johnson*, *post.* and *Mayne v. Walter*, *supra*, 474. *a.* and then proceeded.] The argument of the defendant here is, that the sentence of condemnation is conclusive on the point that the ship was not navigated according to the contract between the parties : *the contract between the parties is that she was a neutral ship, but the sentence has not decided that point ; it has only decided that she was not navigated according to the ordinances of France, but that was no part of the plaintiff's contract.* In deciding this case, in favour of the plaintiff, we do not take upon ourselves to say that the sentence of the French court of admiralty is erroneous : all that we determine is, that the French court has not decided that, which would be a breach of the warranty of neutrality. On the whole I think it clear that the ship in question was condemned for acting in contravention of French ordinances, and that does not falsify the warranty of neutrality."

Le Blanc J.—" On examining the sentences in the different courts of France, we cannot collect, that the ship was ultimately condemned because she was not a Danish ship. As the grounds of condemnation are stated in the sentences themselves, unless we can collect that the ship was condemned as prize, because she was not a Danish ship, those sentences are not conclusive on this question between the litigating parties. The question in this case is, Whether or not the ship were Danish ? in looking through these sentences of condemnation, I do not find that she was condemned as not being Danish, or for not having those documents, that the law of nations or particular treaties between the respective countries require to evidence her to be a Danish or neutral ship. The sentences in France, whether right or wrong, are conclusive on the question of prize ; and

therefore if the question here had been, Whether or not the ship had been captured as prize, those sentences would have been conclusive. But that is not the question here; the only question here being, Whether or not this were a neutral ship at the time of the capture? I admit, that in order to comply with the warranty of neutrality it was necessary, not only that the ship should be a neutral ship, but also that she should be properly documented, and should be navigated in such a manner as to be entitled to the benefits of neutral ships. But here the ship was condemned for non-compliance with the ordinances of one belligerent power, to which it does not appear that *Denmark* ever consented. Then the question is, Whether a sentence, appearing on the face of it to have been given on that ground, ought to preclude the plaintiff from shewing, that in point of fact the ship was a *Danish* ship? *As it does not appear on the sentence that the ship was condemned as not being a Danish ship, I think it is competent for the parties to go into the proof of that fact.* Without repeating the authorities that have been referred to in support of our opinion, I think that the conclusion from them all is this; that *the sentence of a foreign court is conclusive on that point which it professes to decide; if it be a general sentence of condemnation, without assigning any reason, the courts here will consider that it proceeded on the grounds of the ship being the property of an enemy; but if the sentence itself professes to be made on particular grounds, and they are set forth in the sentence, and appear not to warrant the condemnation, then the sentence is not conclusive as to those facts.* Therefore as the sentences of condemnation in this case profess to be made on an ordinance of *France*, to which *Denmark* is no party, *they do not falsify the warranty of neutrality as between the parties to this cause, though they may justify the courts abroad in condemning the ship as prize.* If the question here had been, whether or not the ship had been prize; the sentences abroad would have been conclusive; but the question here being only, whether or not the ship were neutral; those sentences are not conclusive on that point." Judgment was given for the plaintiff.

I have given the opinions of the learned judges nearly at length; because it was a case maturely and fully considered by them; and because the distinctions there taken support the former decisions of Lord *Mansfield* and the judges, who composed

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Bird v.
Appleton,
8 Term Rep.
562. See
ante, c. 12

The next case upon this subject, and which has already been mentioned for another point in a former chapter, was an insurance on the ship *Confederacy*, an *American ship*, at and from Canton in *China* to *Hamburg* or *Copenhagen* : and at the trial a special verdict was found, the facts of which, as far as this point requires the statement of them, were, " that the ship *Confederacy* was an *American-built ship*, the property of *American subjects* ; that the ship sailed from *Canton* towards *Hamburg* with the goods on board in *January 1797*, having on board a passport duly made out and granted according to the form annexed to the Treaty of Commerce between *France* and *America*, and during her voyage was captured by a *French ship* of war, and carried into *Nantz* ; where proceedings being instituted before the tribunal for determining questions of prize, the ship and cargo were condemned as prize." The sentence began with the following considerations : " Considering that although it appears " by reading and examining the documents, and by the declaration of the captain, supercargo, and the greatest part of the " crew, that the ship *Confederacy* has not ceased to be neutral property, and belonging to neutral citizens and subjects of the United " States of *America* : considering that although by the same " documents and declarations, it is equally evident and proved, " that the goods shipped were laden by neutral citizens for account " of neutral citizens : considering that, notwithstanding these " favourable presumptions, nothing can exonerate the captain " and supercargo from having regular dispatches, in order to prove " the neutrality of the ship. The sentence then proceeds to recite certain *French* ordinances, which declare to be good prize all neutral vessels not having on board a list of the crew attested by the public officers of the neutral places. It then says, " considering that so far from derogating from the general regulations " for all nations in favour of the *Anglo-Americans* by the treaty " of *February 1778*, it implicitly subjects them to it by the 25th " and 27th articles, which oblige them to conform to the model " of the passport annexed to the treaty." It also states a law of the Convention, and another of the Executive Directory of the 12th *Ventose* of the 5th year, which latter recites the ordinances of 1744 and 1778, and declares, that all *American* vessels

shall in consequence be good prize, which shall not have on board a list of the crew in due form, such as is prescribed by the model annexed to the treaty between *France* and *America* of 1778. The sentence then concludes thus: "The Tribunal, in conformity to the above-mentioned laws and regulations, and particularly the decree of the Executive Directory of the 12th *Ventose*, 5th year, adjudges and declares the validity of the prize of the foreign ship the *Confederacy*, and all the goods and effects composing the lading or cargo of the ship, in default of the captain and supercargo being regular in their list of crew and dispatches." The special verdict also found that ships belonging to *America* never did at any time prior to the capture in question carry with them lists of their crew attested in the manner required by the ordinances referred to; and that *America* has always insisted, and still insists, that her ships are not, by treaty or otherwise, bound or obliged so to do.

This special verdict was argued several times upon the various points that arose upon it; and the judges afterwards delivered their opinions unanimously, as to this point, in favour of the assured, namely, that the *French* sentence did not decide that the ship was not neutral.

Lord *Kenyon* said—"After the greatest attention I have been able to bestow on the subject, I adhere to the opinion that we gave in the case of *Pollard v. Bell*, and that decision is directly in point to the present case." His lordship then adverted to particular parts of the sentence, which it is unnecessary here to consider; but concluded that it was manifest from an attentive consideration of the whole sentence, that the single ground, on which it proceeded, was that mentioned in the concluding part of the sentence, namely, "in default of the captain and supercargo being regular in their list of crew and their dispatches." Now that is neither required by the law of nations, or by the treaty between *France* and the United States of *America*, and it is found by the verdict that all the requisites of that treaty were complied with.

Mr. Justice *Grose* concurred.

Mr. Justice *Lawrence*.—"The only remaining question is, Whether or not it were decided by the foreign sentence that the ship

C H A P. *was an American?* It was determined in the case of *Pollard v. Bell*, that a sentence of condemnation for violating the ordinances of one nation, not adopted by the treaty between that nation and the country, of which the owner of the property is a subject, will not prevent the assured recovering on the policy, on the ground that such sentence negatives the warranty of neutrality. But the attempt on the part of the defendant here is, not so much to dispute the authority of that case, as its application to the case before us. However, I am of opinion, that, on the whole, we must consider that the foundation of this sentence of condemnation was the violation of *French* ordinances only, and consequently the case of *Pollard v. Bell* is a direct authority for the present."

Mr. Justice *Le Blanc*.—"It only remains to be considered, whether or not the warranty that the ship was an American, is negatived by the sentence of condemnation. We must look to the concluding part of this sentence to see the grounds on which the foreign court professed to decide. If that determination had been founded either on the law of nations, or on the treaty subsisting between *France* and *America*, we could not have enquired whether or not that court had formed a right decision. But if we see that that court condemned the ship and cargo, neither on the law of nations or on the treaty between *America* and *France*, then we are bound to declare, that such a sentence is not conclusive on the parties to this action: it does not affect the question respecting the warranty of neutrality. And I think the sentence is founded simply on an infringement of the *French* ordinances which are particularly pointed out in the sentence, and not any breach of the law of nations or of the treaty between *France* and *America*."

Judgment for the plaintiff.

Price v.
Bell, 1 East's
Rep. 66

In a subsequent case upon a special verdict, the insurance was on a ship and goods, the ship being in fact an *American*, but not warranted to be so, and the case seems to turn, not on the point of enemy's property, but on this, whether the ship was documented as an *American* ship ought to have been according to its own laws and its treaties with other countries. She was provided with a passport, such as is constantly used by all *Ameri-*

can ships, and all other usual papers, and a new muster roll, made-upon oath before the Lord Mayor of *London*, several of his original crew having died, but all the new men being *Americans*, and signed and certified by the *American* Minister, having left the original muster roll with the said Minister. The ship sailed from *London* bound for *Charlestown*, the voyage insured, and was captured by a *French* privateer and carried into *L'Orient*. The sentence of the first tribunal stated the questions of law to be, Whether the new muster roll was in the legal form to supply the first list? And secondly, Whether the bills of lading and other papers touching the cargo prove the neutral property of it? It then proceeds with various considerations, of violated ordinances of *July* 1778, and a decree of the Executive Directory promulgating the ordinances of 1744 and 1778, and decrees the ship and cargo to be good prize: although one of the considerations is to this effect, considering in law that the register and sea letter prove the *American* property of the ship, but the log-book proves that the passport has served for several voyages, contrary to the formal regulations of the 4th article of the ordinance of *July* 1778. From this sentence, the captain appealed; but the superior court declared the former sentence valid, adding to the former ordinances, a law of the 29th *Nivose* last, expressing, "the state of ships in regard to what concerns their neutral or enemy's quality shall be determined by their cargo; therefore, every vessel met at sea laden entirely or in part with goods the produce of *England*, shall be declared lawful prize, whoever may be the owner." This special verdict was argued three several times at the bar, and the Court took time to consider of their opinion, it appearing that the main difficulty of the case turned upon the question of an implied warranty, there being no express one.

The Court did not decide that point, for they were ultimately of opinion, as was declared by Lord *Kenyon* in pronouncing their unanimous judgment, that supposing an implied warranty did exist, the sentences did not negative such a warranty, both the sentences appearing manifestly to have proceeded on the ground of a breach of *French* ordinances, which were contrary to the treaty between the two countries, were not adopted by it, nor is the condemnation expressed by the sentence to have been for acting contrary to the treaty. Judgment for the plaintiff.

But

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Baring v.
Royal Exch.
All. Comp.
5 East 99.

But where the foreign sentence professes to proceed on the ground of an infraction of treaty, such sentence is conclusive against the warranty, although inferences were drawn in such sentence from *ex parte* ordinances in aid of their conclusion that the treaty was broken.

The judgments of the Court of King's Bench, when so deliberately considered, as those just recited, seldom require illustration or confirmation: yet as a case has lately occurred in the Privy Council, upon an appeal from the Court of the Recorder at *Madras*, in which the case of *Pollard v. Bell*, and the principles there laid down were much debated at the bar, and a very learned judgment pronounced by Sir *William Grant*, the Master of the Rolls, the Board consisting at that time of himself, Sir *William Scott* (the Judge of the High Court of Admiralty), Sir *William Wynne* (the Dean of the Arches), and Lord *Glenbervie*, it is thought proper to insert that decision here. It is true the judgment was pronounced in favour of the underwriters: but upon advertng to the grounds of the decision it will appear, that their lordships so determined because they were of opinion that the sentence of the Court of Admiralty had expressly decided, *that the property was not neutral*, and of course had negatived the warranty of neutrality: and even if their lordships had erred in supposing the Court of Admiralty to have decided that point, still their decision would not negative any principle of law, as established by former cases.

K. undertley
and others
appellants v.
Chafe and
others re-
spondents,
Cockpit,
July 21 &
22, 1801.

It was an insurance effected at *Madras* by the appellants, on account of the *Swedish Asiatic Company*, on the ship *Resolution*, Captain *Neale*, and the insurance was declared to be *on goods*, as interest may appear, and warranted *Swedish property*. The ship sailed with a valuable cargo, and being obliged to put into the *Isle of France* for refreshment, the ship and cargo were there seized as prize, and ultimately condemned. The Tribunal of Commerce in the *Isle of France*, after enumerating the various papers and documents found on board, proceeds to state, "That the legal questions for investigation and decision are, first, Whether the proceedings in regard to the fact of the seizure of the ship were carried on agreeably to the terms of the laws relative to proceedings in matter of prize? 2d, Whether, by

“ the papers composing the said proceedings, and there produced by the respective parties, and also from the objections and exceptions severally taken, and by the terms of the regulations and ordinances made on the subject of the navigation of neutral vessels in time of war, *the said ship and her cargo must be considered as enemy's property, and as such confiscated to the use of the Republic; or whether on the contrary the said ship and her cargo must be considered as Swedish property, and restored to the claimants?*” The sentence as to the second question proceeds thus; “ considering that it appears, as well by the confession of the master on his examination, as by the declaration of the passengers and others of the crew, that he is an *Englishman* by birth. Considering that the character of a naturalized *Swede*, adopted by him in the proceedings, cannot be legally entertained; seeing that instead of providing by letters of naturalization from the King of *Sweden*, he only produces an act of his having taken the oath on the 14th *July* 1785, before the Burgomaster of *Gottenburg*, which is insufficient, by reason that every act of nationality or neutralization, can only be proved, according to the usage of the *European powers*, by an act issued by the prince himself. Considering that, even though this certificate of the oath having been taken, should be considered as equivalent to letters of naturalization, granted by the King of *Sweden*, it would want the condition required by law for its validity, as it could only have been made two years subsequent to the declaration of war with *England*, and would consequently be directly opposite to the words of the 6th article of the regulation of neutrals in 1778, which are as follows: “ No regard will any more be paid to passports granted by neutral powers or allies, as well to owners as masters of ships, subjects of states in enmity with his majesty, if they are not neutralized, or have not transferred their property to the states of those powers three months before the first of *September* of the present year.” Considering that it also appears, as well by the proceedings, as by the declaration of the crew, and that of Mr. *Gordon*, that the said *Gordon* is a *Scotchman*, consequently an enemy; that he was second captain on board the said ship *Resolution*; and that he certainly exercised the functions thereof from the period of his leaving *Europe*, and during the whole of the voyage; that this first officer was shipped at *Guernsey*, without any of the forms

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prescribed by law being observed, for proving the disembarkation of the person mentioned in the muster roll, as likewise the necessity of replacing him with an officer of an hostile power. Considering that the regulation of 1778, declaring lawful prize foreign vessels, on board of which there shall be a supercargo, merchant, clerk, or principal officer of an enemy's country, save in those cases as excepted in the 10th article, where the papers shall prove by documents found on board, that they were under the necessity of taking on board chief officers or sailors, at the ports they put into, to replace those belonging to a neutral country, which died in the course of the voyage; and the defendants do not in any manner prove it, agreeably to the directions and regulations. Considering that *the general invoice and bill of lading produced by the captain, the particular invoice of the cargo made by Kindersley, Watts, and Company, and Colt, Day and Company of Madras, being unsigned*, cannot be received by the Court conformably to the 2d article of the same regulation. Considering that the papers produced by Captain Neale, *as well to establish the pretended character of an American*, as likewise to prove the existence of the necessity he was in to replace, at *Guernsey*, the first officer inserted in the muster roll by Mr. Gordon, are neither sufficient nor legal; and that even admitting them to be so, they could not be received by the Court, by reason that they were not delivered within the time prescribed by the terms of the 11th article of the same regulation. Considering that the cargo shipped by Harrop and Stephenson of Tranquebar, is for account of the operations of the ship *Resolution*, as appears by account current of the said gentlemen, of the 29th March 1797. Considering finally, that the King's letters of the 23d of May 1780, issued by order of the Colonial Assembly, and registered in the Tribunal, as forming part of the regulation of 1778, has no other object than to maintain the directions of the regulations, and to recommend circumspection to captains of armed ships towards neutral vessels. *Every thing considered*, the court administering justice, and without paying attention either to the point^s and demands, or to the matters of nullity contended for by the defendants in regard to the proceedings taken by the justice of peace, declare the seizure of the ship *Resolution* to be good and lawful, order the said ship and cargo to be condemned for the use of the republic.

This

This case came on to be tried on the plea side of the Recorder's Court at *Madras*; and a verdict was given for the appellants, subject to the opinion of the Court upon a case reserved upon the single point as to the effect or operation of the sentence of the Court of Admiralty in the Isle of *France*, the Recorder (Sir *Thomas Strange*, now Chief Justice of the Supreme Court of Judicature lately constituted at *Madras*) being of opinion at the trial, that independently of the *French* sentence, the appellants had made out a sufficient case to entitle them to a verdict. Upon the argument of this case, Sir *Thomas Strange* gave judgment for the respondents, stating as the ground of his decision, that the Admiralty Court had considered the question, whether the property was enemy's or neutral, and had condemned it as enemy's, and consequently the warranty was conclusively disproved by that sentence. •

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From this judgment the present appeal was brought, and after elaborate argument at the bar, the Lords of the Privy Council dismissed the appeal, and their judgment was pronounced by

The Master of the Rolls.—“It is necessary to make a few observations to shew the grounds upon which our opinion proceeds, confirming the judgment of the Recorder of the Court at *Madras*.”

Sir William
Grant.

“The opinion, which we have formed as to the effect of the sentence of condemnation, makes it unnecessary for us to go into the consideration of all the questions that have been raised in the course of the discussion. With regard to one, which was started towards the conclusion of the argument, Whether a sentence of condemnation in an Admiralty Court can ever, in a Court of Common Law, be held to falsify a warranty in a policy of insurance of one, who is no party to it? I think it is not open to make that question. Till now, no objection has been made, on the part of the appellants, to the sentence *as evidence*,^o their *gravamen* was, not that it was received for the purpose for which it was offered, but that being received, it did not shew that the condemnation proceeded on the ground of enemy's property: that was the sole question agitated in the Court below. Supposing it had been open to raise that question, I conceive it must here at least have been raised in vain;

C H A P. XVIII. for sitting here as a Court of Appeal from a Court of Municipal Law, we must decide according to those rules, which we find established for Courts of Municipal Law; and therefore we must decide a question on a policy of insurance, in the same manner as we find a Court in *Westminster-hall* would have decided such a question. Now it is quite clear, that from the time of Lord *Hale* down to the present period, it has been settled that a sentence of condemnation in a Court of Admiralty is conclusive. When it proceeds on the grounds of enemy's property, it is conclusive that the property does belong to enemies, not only for the immediate purpose of such a sentence, but it is binding on all Courts and as against all persons. This has been so clearly understood, that it was not even controverted in the case of the *Dutchess of Kingston*, where the conclusive effect of all sorts of evidence was so ably discussed. It was admitted that the sentence of a Court of Admiralty, proceeding *in rem*, must bind all parties—must bind all the world. Now taking a sentence to be conclusive, when it has distinctly determined, that the property belonged to enemies, a question is made, Whether *this sentence* is to produce this effect? It is said every sentence of condemnation does not produce that effect; because by a great many decisions, it has been now established, that if it clearly appears, on the face of the sentence, that it was not on the ground of enemy's property that the condemnation proceeded, but that the Court bottomed itself on some distinct ground, in that case, the warranty of neutrality is not necessarily falsified by such a sentence of condemnation; and certainly there are several cases that have so decided. I have looked at them all, and not one of them will be contradicted by our decision on this case. It is generally to be presumed, that such sentences proceed on legitimate grounds; and therefore they are in general conclusive proof, with respect to the property; negating the warranty of neutrality, and proving the propriety of the condemnation. Hence it follows, that it does not lie on the party producing the sentence, to shew that it has proceeded on the ground of enemy's property; but it is incumbent on the other party, who objects to the sentence, to shew that it proceeded on some other ground. That I take to be the effect of, these decisions; and therefore it is necessary here to shew some distinct and collateral ground, on which the sentence has proceeded, leaving the question of property entirely

undetermined : and accordingly in every one of the cases, in which the effect contended for by the underwriters has been denied to a sentence of condemnation, the court of common law has thought itself warranted in coming to this conclusion, that the sentence itself shews that the question of property was not, and was not professed to be, decided by the Court of Admiralty. What is the case here ? The Court expressly tells us, what the questions were which they had to decide—One question was, “ Whether the proceedings were regular ? The other “ question was, Whether by the papers composing the said proceedings, and there produced by the respective parties, and “ also from the objections and exceptions severally taken, and “ by the terms of the regulations and ordinances, made on the “ subject of the navigation of neutral vessels in time of war, *the said ship and cargo must be considered as enemy’s property*, and as “ such confiscated to the use of the republic ? Or whether, on “ the contrary, *the said ship and her cargo must be considered as “ Swedish property, and restored to the defendants ?*”

“ Whether it was to be confiscated, according to that statement, depended as they say, on the question, Whether it was the property of enemies or of neutrals ? If it was property of enemies, then it was to be confiscated, but if the property of neutrals, it was to be restored to the defendants. Then we find them determine, that it is to be confiscated for the benefit of the republic. Now we must strain very hard to make them contradict themselves in pronouncing the sentence of condemnation, if we say that they did not mean to determine any thing with respect to the property, when at the same moment they said, *the sentence depended entirely on the question of property*. It is said it appears from one of the reasons of their decision, that they must have proceeded on the ground of their own ordinance, particularly on the ordinance of 1778, which declares, “ that the circumstance “ of having a supercargo or chief officer on board belonging to “ an enemy will be a sufficient ground of condemnation.” Now, supposing for a moment, it was chiefly, for certainly it was not solely, through that medium, that they arrived at the conclusion that it was enemy’s property, would that have been sufficient to authorise us to treat the sentence as inconclusive ?

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“Supposing they had stated the facts of the case, without any reference to the ordinance, could any man say that these facts were so irrelevant to the conclusions they have drawn of enemy’s property, that a court of common law would have thought itself at liberty to go into the question, and see *whether the conclusion was warranted or not?* The court of King’s Bench has always disclaimed such a jurisdiction. Then does it vitiate the sentence, that a court of competent jurisdiction has said there is an ordinance, which warrants and supports such a sentence? These ordinances have been misunderstood; sometimes by the courts of Admiralty themselves in *France*, and even (sometimes) by the courts in this country. The courts of Admiralty in *France* have sometimes considered these ordinances as making the law, and as binding on neutrals, and therefore have sometimes declared in the same breath that the property was neutral, and yet that it was liable to condemnation. Whereas all that was meant by those ordinances, was to lay down rules of decision conformable to what the lawyers and statesmen of the country understood to be the just principles of maritime law. When *Lewis* the 14th published the famous ordinance of 1681, nobody thought that he was undertaking to legislate for *Europe*, merely because he collected together, and reduced into the shape of an ordinance, the principles of the marine law as then understood and received in *France*. I say, as understood in *France*, for although the law of nations ought to be the same in every country, yet as the tribunals which administer that law are wholly independent of each other, it is impossible that some differences shall not take place in the manner of interpreting and administering it in the different countries which acknowledge its authority. Whatever may have been since attempted, it was not, at the period now referred to, supposed that one state could make or alter the law of nations; but it was judged convenient to declare certain principles of decision, partly for the purpose of giving an uniform rule to their own courts, and partly for the purpose of apprising neutrals what that rule was. And it was truly observed at the bar in the course of the argument, that it has been matter of complaint against us, (how justly is another consideration,) that we have no such code, by which neutrals may learn how they may protect themselves against capture and condemnation. Now this court in this case seems to me to have well and properly

understood the effect of their own ordinances. *They have not taken them as positive laws binding on neutrals, but they refer to them as establishing legitimate presumptions, from which they are warranted to draw the conclusion, that is necessary for them to arrive at, before they are entitled to pronounce a sentence of condemnation.*

“Supposing they had only stated the facts, as they are now before us, are they to be considered as so irrelevant, that a court of common law would say, “This sentence is repugnant to justice, and is unwarranted on the ground on which it has proceeded?” [The Master of the Rolls here enumerated the facts appearing on the *French* sentence, supposing them to have occurred in a *British* court of Admiralty, and then proceeded.] “Supposing all these circumstances to be brought before a court of Admiralty in this country, I think it would be questionable, whether they would have permitted further proof: I apprehend the property would hardly have escaped condemnation in the first instance. What is the result of all the cases that have been determined? From them all, Mr. Justice *Le Blanc* collects this principle, namely, *that a sentence of a court of Admiralty is conclusive as to all it professes to decide.* Now is it possible to say, that this Court did not profess to decide, whether this was or was not enemy’s property. It was the only question they did profess to decide, for there is no other question stated by them upon which their decision could proceed, except that of, *Whether the property belonged to enemies or neutrals?* And therefore we do not only not contradict any case, that has been decided, by affirming the judgment of the Court below; but we are bound so to do, by all the principles of these cases: and we should contradict them if we did not affirm the sentence of the Court of *Madras*.”

Vide his
opinion in
Pollard v.
Bell.

Lord *Glenbervie*.—“I only wish to make one observation on the case of *Pollard v. Bell*. It seems quite otherwise as to the fact in that case, from this which has been so ably stated here; and I entirely concur in opinion, as it has been now delivered. In the case of *Pollard v. Bell*, the *French* court did not profess to go on the ground of enemy’s property. Here they do profess to go on the ground of enemy’s property. Whether they ought or ought not to have come to this conclusion is another question, but it is clear

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clear that in *Pollard v. Bell*, that particular court did not do so ; it did not decide on the ground of enemy's property or not ; but they declare merely, that the ship is confiscated because she had a belligerent captain or supercargo on board. Now that being the case, and the sentence not having so professed to proceed, the very first fact that was stated in that case was, that *the ship was neutral property*. The warranty was on the ship, though the insurance was on the goods on board ; that being so, it appears that that case is not at all on the facts of it, resembling this."

Sir William Scott.—"From the case of *Pollard v. Bell*, it appears clearly, that the *French* Court of Admiralty had been guilty of great inattention in their own edicts : but by this inaccuracy they brought the facts out distinctly to the view of an *English* court of common law, and thereby enabled them to give the decision they had given." Judgment affirmed.

Osley v. Rowell, 2 East's Rep. 473.

In a still more recent case, one of the points was, as to the conclusiveness of an Admiralty sentence. Mr. Justice *Lawrence* and Mr. Justice *Le Blanc* said, that, after the repeated determinations on the subject, they could not allow the question to be again argued, unless the matter could be carried by appeal to the House of Lords, which, in the present case, it could not be, from the shape in which that cause stood before the court.

Lotian & another, v. Henderson and another, 3 Bos. & Pull. 499.

But the point was at that very time depending in the House of Lords, upon an appeal from *Scotland*, and upon the second hearing of which all the Judges were summoned. I was one of the counsel, and, by the express order of their lordships, in order to set this point at rest for ever, we were desired to argue at the bar the question of the admissibility in evidence of a sentence of a foreign Court of Admiralty, in an action upon a policy of insurance, in order to falsify a warranty of neutrality. And after mature deliberation, although there was some difference of opinion about some special circumstances, all the Judges were unanimous in declaring, that after the continued practice which had taken place from the earliest period, in which, in actions on policies of insurance, questions had arisen on warranties, to admit such sentences as evidence, not only as conclusive *in rem*, but also as conclusive of the several matters they purpose to decide directly, it was too late to examine the practice of admitting them

to the extent, to which they had been received, supposing that practice might have at first appeared to have been doubtful, upon the argument, that, on the authority of those decisions, men had acted for a long series of years, and entered into contracts of assurance in this country, with a perfect knowledge of such decisions, and in expectation of the questions arising out of such contracts, to which such decisions are applicable, being ruled by them. And as to the supposed uncertainty that had prevailed in our Courts upon the construction of foreign sentences, Lord *Alvanley*, Chief Justice of the Court of Common Pleas, said the doctrine laid down in *Kindersley v. Chase* (supra) appeared to him best calculated to do away that uncertainty.

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Lord *Ellenborough*, Ch. J. of the King's Bench, who was necessarily absent at *Guildhall* when the House of Lords decided the cause of *Lothian v. Henderson*, but whose concurrence in the judgment then pronounced was declared by Lord *Eldon* (Lord Chancellor), had soon after an opportunity of declaring from the bench of his own court what he conceived to be the effect of that decision. In delivering the judgment of the Court in *Bolton v. Gladstone*, his Lordship said, "Since the judgment of the House of Lords in *Lothian v. Henderson*, it may now be assumed as the settled doctrine of a Court of *English* law, that all sentences of foreign Courts of competent jurisdiction to decide questions of prize, are to be received here as conclusive evidence in actions upon policies of assurance, upon every subject immediately and properly within the jurisdiction of such foreign Courts, and upon which they have professed to decide judicially."

Bolton v.
Gladstone,
5 East. 155.

But they must decide upon the point distinctly, in order to affect a warranty or representation in a policy of insurance. That they meant to decide the point is not to be collected by inference or argument, but by specific affirmation. Lord *Ellenborough* so declared on the trial of an action on a policy of insurance on the ship *Juno*, represented as an American, at and from London to Africa, during her stay and trade there, and from thence to her port or ports of discharge in the West Indies.

Fisher v.
Ogle, Sit-
5

The ship was captured by a French privateer, carried into *Martinique*, and there condemned in the Vice-Admiralty

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Court. To falsify the representation of neutrality, the defendant now gave in evidence the sentence of condemnation. This stated, "that it resulted evidently from the papers on board; that the expedition of the said ship *Juno*, her cargo, and the operations of her captain on the coast of *Africa*, were for account of the brothers *Geddes*, merchants of *London*, who had, to masque the English property of this outfit, borrowed the American flag and passport of the said ship *Juno*, and taken for their agent and partner in this expedition Captain *Fischer*, furnished with a certificate of a citizen of the United States." The sentence afterwards went on to declare as good and valid prize the slave ship *Juno*, and to confiscate the said ship and her cargo to the profit of the captors, without stating any specific grounds for the condemnation.

Lord *Ellenborough*. "We shew a sufficient respect for *French* sentences, if we attach credit in our courts to what they distinctly say. It is often painful to go this length, considering the piratical way in which they proceed. But this sentence does not say that the ship was not *American*; and it is not to be considered as evidence of what it does not specifically affirm. I dare say such sentences will be positive enough in future, since those who frame them are disposed to consider every thing as good prize against all mankind. When they do speak out, I will give them the same effect here which they receive in other places. But there is no proof in the present case that the property was not *American*, although such an inference might be drawn from certain indirect statements in the sentence now presented to us." Verdict for the plaintiff.

Mich. T.
49 G. 3.

In the ensuing term a motion was made for a new trial: and it was contended by the counsel for the defendant, that it necessarily resulted from the terms of the sentence of the *French* Admiralty Court, that the Ship *Juno* and her cargo were not *American*, although this was not positively averred in any part of it; and that, according to the principle of former decisions, the sentence of a foreign Court of competent jurisdiction must be taken as conclusive evidence of the facts upon which it evidently proceeds.

ship or her cargo not being *American*. Is there any case in which it has been held that Judges must fish for a meaning, when a sentence of this kind is produced to them. Here the foreign Court seems not to have any settled opinion upon the subject, and not to have known or cared on what grounds it proceeded to a condemnation. It is by an overstrained comity that these sentences are received as conclusive evidence of the facts which they positively aver and upon which they specifically profess to be founded.

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The other Judges were of the same opinion, and the rule was refused.

The general result of all these cases seems to be this; that where a man has warranted, by his contract of insurance, that his property is neutral, and the belligerent country condemns that very property as belonging to an enemy, however absurd that decision may be, this is conclusive evidence that the warranty contained in the contract is false: but if the belligerent country condemn as prize, not adverting to the question of neutrality at all, but stating the ground to be a violation of some rule, which they have adopted for their own government in the decision of questions of prize, it may or may not be a just ground of condemnation as between the belligerent and the neutral, but it cannot at all operate to prove the truth or falsehood of a fact, asserted in a contract of insurance, and which may be perfectly true, quite consistently with the justice of their decision. The following case proceeds entirely on this principle; for the *French* sentence does not once mention the question of neutrality.

In an action on a policy of insurance on the captain's goods and private adventure, warranted *American* property, on board the ship *Friends*, at and from *London* to *Virginia*, a sentence of a *French* Court of Admiralty was produced, which was to the following effect: "Forasmuch as the true destination of the ship was for the *English* islands, having been hired and loaded at *London*, and that there has been found on board her 80 barrels of gunpowder; the court declares the said brig *Friends*, together with her cargo, a good prize."

Calvert v.
Bovill,
7 Term
Rep. 523.

The court of King's Bench held that this sentence was not conclusive against any violation of neutrality, the facts of the

C H A P. case and the reasons expressly given, leading to a contrary conclusion. If the sentence, indeed, had condemned the goods, because they were the property of an enemy, that judgment would have been conclusive, but they have given other reasons for their sentence.

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The following case upon the forfeiture of neutrality has been as to one of the main points of it, namely the right of nations at war, to search neutral ships, overturned by a decision of the High Court of Admiralty, and also by one in the Court of King's Bench.

Salucci v.
Johnson,
H. R. Hil.
25 Geo. III.

It was an action brought upon a policy of insurance on the ship *Thetis*, a *Tuscan* ship, warranted neutral. At the trial a verdict was found for the plaintiffs, subject to the opinion of the Court, upon a case stating, That the plaintiffs were *Tuscan* subjects resident at *Leghorn*, and the sole owners of the ship in question: that the ship, having *neutral goods* on board consigned to *London*, was captured off the coast of *Barbary* by a *Spanish* vessel. That she was carried into *Spain*, and there condemned as prize; which sentence upon appeal to a superior court, was reversed: but upon further appeal, the last sentence was reversed, and the first confirmed. That the grounds of condemnation were two; 1st, That the ship *Thetis* refused to be searched, and resisted with force, having fired at the ship of the *Spaniard*, and continued firing, after the *Spanish* colours were hoisted: 2d, That the *Thetis* had no charter-party on board. The captain answers these two grounds thus: 1st, That he resisted and fired, the *Spaniard* having hailed him under false colours: 2d, That he had taken the goods on board by the piece, and that she was a general ship; in which case a manifesto was sufficient, without a charter-party. The sentence of the last court admits the ship to be neutral; for it states it to be "the ship *Thetis*, a *Tuscan* ship, &c." but condemns her as good and lawful prize.

Lord Mansfield was absent at the argument of this case.

Mr. Justice Willes.—"This is clearly a neutral ship. Something was said in argument about barratry; but I do not think the act of the captain in this case amounts to that offence. The

second ground of condemnation is given up by the counsel ; and the remaining question is, whether the captain has been guilty of such a breach of neutrality, as should affect the owners. If a ship be neutral, and she be stopped, those, who stop her, must pay for the detention. But it is said she must stop to be searched. I find no authority for such a position. Besides, the circumstances are very suspicious. The captain seems to have acted properly. Stoppage is always at the peril of the captors."

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Mr. Justice *Ashburst*.—"I take the principle laid down at the bar to be true, that a ship warranted neutral must conduct herself so as not to forfeit her neutrality. But the facts of this case do not admit of the application. I do not find, that a neutral ship must submit to be searched. It is rather an act of superior force, always resisted when the party is able ; and the right falls within this position, that the searcher does it at his peril. If he find any thing contraband, or the property of an enemy, he is justified : if not, he pays costs. Is there any thing to justify the search in this case ? Certainly not, for the cargo was neutral. As to the next question, her not having a charter-party, this clearly is not required by the law of nations ; and it appears from the case that she was a general ship, and although it may be contrary to a *particular* ordinance of *Spain* to sail without a charter party, other nations are not bound to take notice of such ordinance, unless in virtue of some treaty subsisting between two states, by which they submit to be bound by such ordinance. That is not the case here, and therefore it falls within one of the perils insured against."

Mr. Justice *Buller*.—"It is not necessary to give an opinion as to barratry ; but I take it to mean a wilful act of the captain to the injury of the owners. This would have been barratry, if it had been an act, which forfeits the neutrality. I do not agree that the property must continue neutral during the whole voyage. If it be neutral at the time of sailing, it is sufficient ; and if a war break out next day, the underwriter is liable. The answer given to the claim of search is conclusive, that the party does it at his peril ; just like the case of Custom-house officers. The practice of the Admiralty confirms it ; for they give costs in cases of improper detention : which they would not do, if neutral ships were, at all events, liable to be stopped. Detention by particular ordinances,

Vide *supra*.

C H A P. ordinances, which do not form a part of the law of nations, is a
XVIII. risk within the policy. At first I compared this case in my own mind to that of an illegal voyage; but they are no way similar; for a ship is only bound to take notice of the laws of the country she sails from, and of that to which she sails; but not the particular ordinances of other powers." Judgment was accordingly given for the plaintiff.

Gariells v. This case, thus decided, came under the consideration of the
Kennington, Court of King's Bench in the year 1799. It was an action on a
8 Term Rep. policy on goods in the ship *Dispatch*, warranted *Danish* ship and
230. property. The loss was alleged to be by capture. A sentence of a *British* Court of Admiralty was produced, stating, that the said neutral ship *Dispatch*, with the cargo, being *Danish* property, had been under the authority of the law of nations and of war, and agreeably to existing treaties stopped and detained by the commander of one of his majesty's ships, and by him sent towards the port of *Mole S. Nicholas*, for the purpose of being legally examined, under the command of *Barrett*, a midshipman, and two seamen; and that on the near approach to the port, the master, supercargo, and crew of the said ship, had, in direct violation and breach of their neutrality as *Danish* subjects, and contrary to the law of nations and the faith of treaties, forcibly rescued and taken and kept possession thereof till again captured by a *French* privateer, and she was again captured by one of his majesty's ships; and the said neutral ship and cargo were therefore adjudged good prize.

The Court was of opinion, that the sentence of the Court of Admiralty was conclusive that this vessel had so conducted herself as to forfeit her neutrality; by acting in violation of that neutrality, and contrary to the law of nations and faith of treaties. That as to the question concerning the right of searching neutrals, it was said by the Court, that before the late armed neutrality it was considered in this country, and so decided in many cases, that the right of searching neutrals was part of the law of nations; and that such right was supposed to be founded on reason. Judgment was given for the defendant.

The Court, however, in the above case, said, they did not mean to overturn the case of *Saloucci v. Johnson*, for in that case the Court of Admiralty had no ~~opinion~~ was in the present case, that

that the ship had forfeited her neutrality. But the general point there mentioned that a neutral ship need not submit to be searched, cannot be supported; for it is laid down in *Vattel*, that this right clearly exists, without which the commerce of contraband goods could not be prevented.

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Vattel, book
3. ch 7.
f. 114.

Besides which, in a late case in the Court of Admiralty, Sir *William Scott* thus states the law: "That the right of visiting and searching merchant ships upon the high seas, whatever be the ships, whatever be the cargoes, whatever be the destinations, is an incontestible right of the lawfully commissioned cruizers of a belligerent nation; because till they are visited and searched, it does not appear what the ships, or the cargoes, or the destinations are; and it is for the purpose of ascertaining those points, that the necessity of this right of visitation and search exists. This right is so clear in principle that no man can deny it, who admits the legality of maritime capture; because if you are not at liberty to ascertain by sufficient enquiry whether there is property that can legally be captured, it is impossible to capture. Even those who contend for the inadmissible rule, *that free ships make free goods*, must admit the exercise of this right at least for the purpose of ascertaining whether the ships are free ships or not. The right is equally clear in practice, for practice is uniform and universal upon the subject. The many *European* treaties which refer to this right, refer to it as pre-existing, and merely regulate the exercise of it. All writers upon the law of nations unanimously acknowledge it, without the exception even of *Hubner* himself, the great champion of neutral privileges. In short, no man in the least degree conversant in subjects of this kind, has ever, that I know of, breathed a doubt upon it. The right must unquestionably be exercised with as little of personal harshness and of vexation in the mode as possible; but often it as much as you can, it is still a right of force, though of lawful force, something in the nature of civil process, where force is employed, but a lawful force, *which cannot lawfully be resisted*." In another place, this very learned person adds, "The penalty for the violent contravention of this right is the confiscation of the property so withheld from visitation and search (a)."

The *Maris*,
Paulsen,
Master, de-
cided the
11th June
1799, and
the report
published by
Dr. Robin-
son.

(a) I am sorry that I cannot transcribe more of this judgment, so fraught with learning, and so eloquent in its composition: but it is the less to be lamented, as Dr. *Robinson* has gratified the public by publishing it entire, as pronounced, in a pamphlet intitled *a Report of the Judgment*, &c. &c. &c.

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These are the cases which have been decided, relative to the judgments of foreign courts being conclusive, and the effects which they have upon the contract of insurance: and from all of them it should seem, that this general doctrine may be collected: That wherever the ground of the sentence is manifest, and it appears to have proceeded expressly upon the point in issue between the parties; or wherever the sentence is general, and no special ground is stated, there it shall be conclusive and binding, and the courts here will not take upon themselves, in a collateral way, to review the proceedings of a forum, having competent jurisdiction of the subject matter. But if the sentence be so ambiguous and doubtful, that it is difficult to say on what ground the decision turned; there evidence will be allowed in order to explain. And if the sentence upon the face of it be founded upon partial ordinances alone, the insured shall not be deprived of his indemnity; because, to use the words of Mr. Justice *Buller*, any detention, by particular ordinances or decrees, which contravene, or do not form a part of the law of nations, is a risk within a policy of insurance.

Thellusson
v. Sheddon,
2 New Rep.
228. and
see Stat.
43 Geo. III.
ch. 160.
s. 40.

If an insured declare upon a total loss by capture, and after proving a capture shew that a re-capture took place, upon which proceedings were had in the Admiralty, the Court of Common Pleas held he cannot recover even the amount of the salvage, proceedings and sale from the insurers, without proving the proceedings in the Admiralty under the seal of that Court, if the insurer chuses to insist upon it.

CHAPTER THE NINETEENTH.

Of Return of Premium.

HAVING in several chapters spoken fully of the various cases, in which policies of insurance are either absolutely void, or are rendered of no effect by the failure of the insured in the performance of some of those conditions, which he had taken upon himself: the next object of our inquiry will be, in what cases, and under what circumstances, there shall be a return of premium.

In all countries, in which insurances have been known, it has been a custom, coeval with the contract itself, that where property has been insured to a larger amount than the real value, the insurer shall return the overplus premium; or if it happen that goods are insured to come in certain ships from abroad, but are not in fact shipped, the premium shall be returned. If the ship be arrived before the policy is made, and the underwriter is acquainted with the arrival, but the insured is not, it should seem the latter will be entitled to have his premium restored, on the ground of fraud. But if both parties be ignorant of the arrival, and the policy be (as it usually is) *lost or not lost*, I think in that case the underwriter should retain; because under such a policy, if the ship had been lost, at the time of subscribing, he would have been liable to pay the amount of his subscription. The parties themselves frequently insert clauses in the policy, stating, that upon the happening of a certain event, there shall be a return of premium. These clauses have a binding operation upon the parties; and the construction of them is a matter for the court, and not for the jury, to determine.—In short, if the ship, or property insured, was never brought within the terms of the written contract, so that the insurer never has run any risk, the premium must be returned.

The principle upon which the whole of this doctrine depends, is simple and plain, and admits of no doubt or ambiguity. The

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Loocenius
de jure
marit. l. 2.
c. 5. d. 8.

1 Mag. 90.

Dougl. 268.

1 Ves. 319.

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Pothier,
n. 179.
3 Burr.
1240.
Roccus,
Not. 88.
Cowp. 668.

risk or peril is the consideration for which the premium is to be paid: if the risk be not run, the consideration for the premium fails; and equity implies a condition, that the insurer shall not receive the price of running a risk, if, in fact, he runs none. It is just like the contract of bargain and sale; for if the thing sold be not delivered, the party who agreed to buy, is not liable to pay. Thus to whatever cause it be owing, that the risk is not run, as the money was put into the hands of the insurer, merely for the risk of indemnifying the insured, the purpose having failed, he cannot have a right to retain the sum so deposited for a special cause.

Mart.
Sitwell,
1 Sho. 156.

Accordingly in an action of *indebitatus assumpsit* brought by the plaintiff for 5*l.* received by the defendant to the plaintiff's use, where the general issue was pleaded; it appeared in evidence, that one *Barkdale* had made a policy of insurance upon account for 5*l.* premium in the plaintiff's name, and that he had paid the said premium to the defendant, and that *Barkdale* had no goods then on board, and so the policy was void. To this action two objections were taken: 1st, That it should have been brought in *Barkdale*'s name, which was over-ruled. 2dly, That this ought to have been a special action on the custom of merchants. Lord Chief Justice *Holt* cited a case of money deposited upon a wager concerning a race, that the party winning might bring an action of *indebitatus assumpsit*, for money received to his use; for now by the subsequent matter it is become as such. And as to the case in question, the money is not only to be returned by the custom, but the policy is made originally void, the party, for whose use it was made, having no goods on board; so that by this discovery the money was received without any reason, occasion, or consideration, and consequently it was received originally to the plaintiff's use. And so judgment was given for the plaintiff.

I cite this case for two purposes; because it serves to shew in what form of action the plaintiff ought to demand a return of premium: and it also points out, that as early as the beginning of the reign of *William & Mary*, the true principle, on which the premium ought to be returned, was fully established. It was said in the introduction to this chapter, that clauses are frequently inserted in policies of insurance, containing con-

ditions, on the performance or non-performance of which, the premium is returnable; and that to decide upon the construction of such conditions is the province of the Court, and not of the jury. Such a case occurs, which may properly be mentioned here.

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This action was brought against an underwriter, for a return of premium. The material part of the policy was in these words: "At and from any port or ports in *Grenada to London*, "on any ship or ships that shall sail on or between the first of "May and the first of *August 1778*, at 18 guineas *per cent.* to "return 8*l. per cent. if she sails from any of the West India Islands*, "with convoy for the voyage, and arrives." At the bottom there was a written declaration that the policy was on sugars (the muscovado valued at 20*l. per hogthead*) for account of *L. 2.* being on the first sugars which shall be shipped for that account. The ship the *Hankey* sailed with convoy, within the time limited, having on board 51 hogtheads of muscovado sugar, belonging to *L. 2.* She arrived safe in the *Downs*, where the convoy left her; convoy never coming farther, and indeed seldom beyond *Portsmouth*. After she had parted with the convoy, she struck on a bank called the *Pan Sand*, at *Margate*, and 11 of the 51 casks of sugar were washed overboard, and the rest damaged. The ship was afterwards got off the bank, and proceeded up the river, arrived safe in the port of *London*, and was reported at the custom-house. The sugars saved were taken out at *Margate*, and, after undergoing a sort of cure, by a person sent from town for that purpose, they were carried to *London* in other vessels; and the 40 hogtheads being sold, produced 340*l.* instead of 800*l.* which was their valuation in the policy. The defendant had paid into court the value of the sugars lost, and a return of 8*l. per cent.* on 340*l.* The plaintiffs insisted, that they were entitled to have 8*l. per cent.* also returned on the valued price of the eleven hogtheads of sugar which were lost, and on the difference between what the remaining forty hogtheads produced, and their valued price. At the trial, before Lord *Manfield*, the plaintiffs had a verdict to the full amount of their demand. The chief question, upon the motion for a new trial, was, To what the word "*arrives*" was intended to apply?

Simond and
another v.
Boydell,
Doug. 255.

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Vide ante,
c. 18.

Lord Mansfield.—“The ancient form of a policy of insurance, which is still retained, is, in itself, very inaccurate; but length of time, and a variety of discussions and decisions, have reduced it to certainty. It is amazing, when additional clauses are introduced, that the merchants do not take some advice in framing them, or bestow more consideration upon them themselves. I do not recollect an addition made, which has not created doubts on the construction of it. Here a word or two more would have rendered the whole perfectly clear. However, I have no doubt how we must construe this policy. Dangers of the sea are the same in time of peace and of war; but war introduces hazards of another sort, depending on a variety of circumstances, some known, others not, for which an additional premium must be paid. Those hazards are diminished by the protection of convoy, and if the insured will warrant a departure with convoy, there is a diminution of the additional premium. If the insured will not warrant a departure with convoy, he pays the full premium, and in that case the underwriter says, “If it turn out that the ship departs with convoy, I will “return part of the premium.” But a ship may sail with convoy, and be separated from it by a storm, or other accident, in a day or two, and lose its protection. On a warranty to sail with convoy, that would not be a breach of the condition; but to guard against that risk, the insured adds, in policies of the present sort, “the ship must not only sail with convoy, but she must “arrive, to entitle me to the return.” The words, *and arrives*, do not mean that the ship shall arrive in the company of the convoy, but only that she herself shall arrive. If she does, that shews, either that she had convoy the whole way, or did not want it. But, in the stipulation for the return of premium, no regard is had by the parties to the condition of the goods on the arrival of the ship. The construction, contended for by the defendant, is adding a comment longer than the text. If it had been meant that no return should be made, unless *all* the goods arrived *safe*, they would have said, “if the ship arrive *with all “the goods,”* or “*safely with all the goods.*” The total or partial loss of the goods was the subject of the indemnity, and must be paid for by the underwriter. But, as to the return of the additional premium, whether the goods arrive safe or not, makes no part of the question. The single principle which must govern

is, that in the events which have happened, the war risk has been rated too high." C H A P.
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Mr. Justice *Willis*, and Mr. Justice *Ashburst*, were of the same opinion.

Mr. Justice *Buller*.—"I am of the same opinion. *The question is for the decision of the Court, not of a jury*, since it arises on the construction of a written instrument. What gives rise to an increase of the premium? The danger of capture. When that danger is diminished, the construction must be, that there shall be a proportional return of premium." The rule for a new trial was accordingly discharged.

So also in a later case, where, in a policy on freight, this clause was found, "to return 10l. *per cent. if the ship sailed with convoy and arrived*;" it was contended at the bar that, although the ship sailed with convoy, and although she arrived at her port of destination; yet as she had been captured and recaptured during the voyage, and had paid salvage to the re-captors, the plaintiffs (the assured) were not entitled to a return of premium within the true construction of the above clause.

Aguilar and
others v.
Rodgers,
7 Term Rep.
421.

Lord *Kenyon* delivered the unanimous opinion of the Court: I agree with the counsel for the defendant, that every arrival of the ship at her port of destination would not be an arrival within the fair construction of this memorandum; such, for instance, as an arrival in the possession of an enemy at a neutral port; or an arrival at her port in *England* as the property of other persons after a capture. But in order to satisfy the meaning of the memorandum, it should be *an arrival at the destined port in the course of her voyage*. It is now too late to controvert the authority of *Hamilton v. Mendes*, even if we were disposed to do so, which I am not, where it was holden that though the assured may abandon, on hearing of a capture, yet if they do not abandon, and the ship be afterwards recaptured, it must be considered as if she had never been out of the possession of the owners. It is 18 years since the case of *Simond v. Boydell* was decided; that case must be well known in the commercial world; and if the parties in this case had

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memorandum import, they would have added after *arrived*, “safely “from the enemy,” or some words to that effect. But the words here used are not equivocal; and we ought not to depart from them: it would be attended with great mischief and inconvenience if in construing contracts of this kind we were not to decide according to the words used by the contracting parties. Suppose this question had arisen on a contract under seal, and an action of covenant had been brought, assigning as a breach the non-arrival of the ship at the port of *London*, the answer that in fact the ship did arrive there in the course of her voyage would have been decisive. And if so, this memorandum must receive the same construction in this action. On the grammatical construction of the words, which is the safest rule to go by, I am of opinion that the verdict obtained by the plaintiff ought not to be set aside (*a*).

Comp. 668.

By the law of *England*, it has been clearly settled, that whether the cause of the risk not being run, is attributable to the *fault, will, or pleasure* of the insured, still the premium is to be returned. Foreign writers have in some measure differed in opinion upon this point; and it may not be improper to observe how far they vary or agree with our own. The *Italian* writers agree with us, that the contract in question is conditional, and that the risk is the very essence and main spring of the whole. But still they insist and contend, that it is not lawful for the assured, *by their own act*, to break the contract; and that in such a case, the insurer is not obliged to return the premium.

Audley v. Duff, 2 Bos. & Pull. 111. So where the words were, *if she depart from Portugal and arrive*. *Everard v. Hollingworth*, 2 Bos. & P.

(*a*) In a late case in the Common Pleas, there was the following clause for a return of premium in a policy “at and from *Oporto* to *Lynn*, with liberty to touch at any ports on the coast of *Portugal* to join convoy, particularly at *Lisbon*, to return *6l. per cent.* if she sail with convoy from the coast of *Portugal* and arrive.” The ship sailed from *Oporto* under the protection of a sloop and cutter appointed to protect the trade of that place to *Lisbon*, from whence it was to sail under a larger convoy to *England*. In the way to *Lisbon*, the fleet was dispersed, and this ship ran for *England* and arrived. It was contended that this ship had not sailed from the coast of *Portugal* with convoy. But the Court held, that having sailed from *Oporto*, with a convoy duly appointed, with a *bona fide* intention to proceed to *England*, though by desire of the Admiral, *Lisbon* was to be taken in the way, the condition, on which the return of premium was to be made, had been performed.

These cases where the words *and arrived* follow other conditions, those words being which overrides all the other stipulations; and no arrival at any time will do, unless the vessel arrives at its ultimate port of destination.

They hold indeed, that if the voyage be put an end to by any accident, such as the ship being burnt, or by public authority; or if more goods were *bond fide* insured than were actually on board: in the former cases, the whole; and in the latter, a proportional part of the premium should be returned. But if a man say he has goods on board, and insure them, knowing that he has none, they ask this question: "An affecurator teneatur restituere pretium, eo quod in navi non fuerunt merces? Videbatur affecurator teneri ad restitutionem pretii recepti: sed in contrarium est veritas, quod non solum non teneatur pretium restituere, imo possit patere illud; et ratio est, quia licet emptio periculi non teneat in præjudicium promissoris, tamen in ejus favorem, et in præjudicium affecurati falsa assertio bene tenet."

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Roccus,
Not. 15. 32.
33.

Roccus,
Not. 11.

Santerna,
part 3. n. 22.

The *French* law-givers have, however, decided upon this point agreeably to our laws; and have accordingly, in the famous ordinances of *Lewis* the Fourteenth, inserted an article declaring, that if the voyage is entirely broken up before the departure of the ship, *even by the act of the insured*, the insurance shall be void, and the underwriter shall return the premium, reserving one half *per cent.* for his trouble. This article affords some scope to *Valin*, the very learned commentator upon these ordinances, to point out the advantages which the insured enjoys above the insurer, in being thus able to put an end to the contract, even after it is signed, which the underwriter can by no means effect. Indeed, when we consider that the premium is nothing more than the price of the perils, which the underwriters ought to run; and that the obligation to pay the premium contains this tacit condition, "I will pay *if the insurers run the risk*;" it is perfectly consistent with that principle, that when the risk is not run, whatever be the cause, the premium is not due to the insurers. Accordingly in *England*, it has always been the custom, when the policy is cancelled, to return the premium, deducting one half *per cent.*

2 Emerigon,
151. Ord.
of Lew. 14.
tit. Affur.
art. 37.

2 Val. 93.

Pothier,
Not. 179.

Molloy, l. 2.
c. 7. f. 12.

The generality of the rule here established would seem to extend it even to cases of fraud on the part of the insured. By the laws of *France*, upon this subject, have declared, that the insured shall be obliged to restore to the insurer, *ever he has received from him*, and also to pay him *the pr*

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Vide ante,
c. 10.
p. 283.

mium. This question relative to a return of premium; in cases of fraud, was very fully discussed in the chapter of fraud, and all the cases fully cited; to that chapter therefore I must now refer the reader.

See ante,
c. 13. p.
333.

Some of the statutes for preventing the exportation of wool, and other staple commodities of the kingdom, and which, in order more effectually to prevent such exportation, have declared policies of insurance on those articles to be null and void, have enacted that the premium shall not be restored to the insured,

79 Geo. II.
c. 37.
Vide supra,
c. 14.

When a policy is void, being made without interest, contrary to the statute of the 19th Geo. the Second, *if the ship has arrived safe*, the Court will not allow the insured to recover back the premium; according to the old rule of law, *in pari delicto potior est conditio possidentis*. But in the decision of the case, in which this doctrine was held, the court seemed to rely much upon the distinction of contracts executed and executory: that this was a contract *executed*, the ship having arrived before the demand was made; but when a contract *executory* is to be rescinded, it can only be done upon the equitable terms of putting all parties in their original situation. Mr. Justice Willes in this case differed in opinion from the rest of the court, for reasons delivered by the learned judge, and which will appear in their proper place.

Dougl. 471.

Lowry and
another v.
Bourgeois,
Dougl. 468.
Vide ante,
p. 365.

The plaintiffs had lent to *Lawson*, captain of the *Lord Holland East Indiaman*, 26,000*l.* for which he had given them a common bond, in the penal sum of 52,000*l.* While he was with his ship at *China*, the plaintiffs got a policy of insurance, underwritten by the defendant and others, which was in the following terms: "At and from *China* to *London*, beginning the adventure upon the goods from the loading thereof on board the said ship at *Canton* in *China*, &c. and upon the said ship, from and immediately following her arrival at *Canton*, valued at 26,000*l.* being the amount of Captain *Patrick Lawson's* common bond, payable to the parties as shall be described on the back of this policy; and it bears date the 16th day of *December*, 1775; and in case of a loss, no other proof of interest to be required than production of the said bond: warranted free from average and loss of salvage to the insurer." At the head of the descriptions

subscriptions was written, "*On a bond as above expressed.*" C H A P.
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 Captain *Lawson* sailed from *China*, and arrived safe with his privilege (as it is called) or adventure, in *London*, on the first of *July* 1777, none of the events insured against having happened. The receipt of the premium was acknowledged on the back of the policy. The insured brought this action for a return of the premium, on the ground that the policy being without interest, the contract was void. The cause came on before Lord *Mansfield*, at *Guildhall*, when his Lordship was of opinion, that the policy was a gaming policy, prohibited by the statute of 19 *Geo. 2. c. 37.* and both parties equally guilty of a breach of the law; that the rule, therefore, of *melior est conditio possidentis*, was applicable to the case, and the plaintiffs could not recover the premium. A verdict was accordingly found for the defendant, agreeably to his Lordship's directions; but, the next morning, he expressed a doubt as to the propriety of his opinion, because the money had been paid upon an executory agreement, which could never have been completed. A new trial was then moved for, and fully argued.

Lord *Mansfield*.—"It is certainly true, in many instances, that first thoughts are best. I am now very much inclined to my first opinion. There are two sorts of policies of insurance: mercantile and gaming policies. The first sort are contracts of indemnity, and of indemnity only; and from that principle a great variety of decisions and consequences have followed. The second sort may be the same in form; but in them there is no contract of indemnity; because there is no interest on which a loss can accrue. They are mere games of hazard; like the cast of a die. In the present case, the nature of the insurance is known to both parties. The plaintiffs say; "We mean to "game; but we give our reason for it; Captain *Lawson* owes "us a sum of money, and we want to be secure, in case he "should not be in a situation to pay us." It was a hedge, but they had no interest; for if the ship had been lost, and the underwriters had paid, still the plaintiffs would have been entitled to recover the amount of the bond from *Lawson*. This then is a gaming policy, and against an act of parliament; and therefore it is clear that the Court will not assist either party; according to the well-known rule that *in pari delicto*, &c. that the defendant's right is better than that of the plaintiff."

C H A P. XIX. must draw their remedy from pure fountains. I have returned to my old opinion; sometimes you miss the mark, by taking too long an aim."

Vide ante,
c. 10.

Mr. Justice *Willes*.—"I shall make no apology for differing from the rest of the court in a case where such great abilities have entertained two different opinions. The premium has been paid, and yet no risk run; for the policy was void from the beginning, and the insured could not have recovered from the underwriters if the ship had been lost. But I cannot think it a gaming policy. It does not appear to me that the parties had any idea they were entering into an illegal contract. The whole was disclosed, and they *thought* there was an interest. This was a mistake; but it is a new point of law. The case, cited from precedents in Chancery, is not, perhaps, decisive, but it goes a great way; and it would be very hard that a party should lose that which he has paid under a mere mistake. I think, in conscience, the defendant ought to refund the premium."

Mr. Justice *Asbhurst*.—"I am clear that there ought not to be a new trial. A policy of insurance ought to be a mere contract of indemnity, and nothing more; but here the money might have been paid twice; which shews decisively that this was a gaming policy."

Mr. Justice *Buller*.—"It is very clear to me that the plaintiffs ought not to recover. There was no fraud on the part of the underwriters, nor any mistake in matter of *fact*. If the law was mistaken, the rule applies, that *ignorantia juris non excusat*. This was a mere gaming policy, without interest. There is a sound distinction between contracts executed and executory, and if an action is brought with a view to rescind a contract, you must do it while the contract continues executory, and then it can only be done on the terms of restoring the other party to his original situation. There was a case of *Walker v. Chapman*, some years ago in this court, where a sum of money had been paid in order to procure a place in the *Customs*. The place had not been procured, and the party who had paid the money, having brought his action to recover it back; it was held that he should recover, the contract remained executory. So, if the plaintiffs' case had brought their action, before the risk was voyage finished, they had a ground

for their demand ; but they waited till the risk, such as it was, (not indeed, founded in law, but resting on the honour of the defendant), had been completely run. It makes no difference whether the premium was paid before the voyage or after it." The rule was discharged.

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And very lately it has been held upon the authority of *Lowry v. Bourdieu*, as not being distinguishable from it, that an action for money had and received will not lie to recover back the premium of re-assurance void by the statute of 19 Geo. 2. ch. 37.

Andree v.
Fletcher,
3 Term.
Rep. 266.
See ante,
p. 372.

Lord *Mansfield*, after the rule was discharged in *Lowry v. Bourdieu*, said, he desired it might not be understood, that the court held, that, in all cases where money has been paid on an illegal consideration, it cannot be recovered back. That in cases of oppression, when paid, for instance, to a creditor to induce him to sign a bankrupt's certificate, or upon an usurious contract, it may be recovered, for, in such cases, the parties are not *in pari delicto*.

That the court, in the case of *Lowry v. Bourdieu*, proceeded upon the distinction between contracts executed and executory, is evident, not only from Mr. Justice *Buller's* opinion, but is, in some measure, confirmed by what fell from Lord *Mansfield* upon a subsequent occasion, when this case was cited ; although it must be confessed, that the case about to be quoted, which was only decided suddenly at *nisi prius*, is a good deal shaken by the subsequent decision of *Andree v. Fletcher*.

It was an action brought upon two wagers : one of 26*l.* 5*s.* to 100*l.* the other of 13*l.* 2*s.* 6*d.* to 30*l.* that the colonies of *North America* would be admitted or acknowledged independent states, by some public official act or instrument made or executed, on the part of the king or government of *France*, at some time on or between the 1st of *February* and the 1st of *April* 1778, both days inclusive. The defendant pleaded *non assumpsit*. Upon the opening of this case, Lord *Mansfield* directed the plaintiff to be nonsuited. But the counsel for the plaintiff insisted, that he was entitled to a verdict for the premium on the general count in the declaration, for money had and received ; which his Lordship permitted on the ground of the being void. ~~and not having~~

Wharton v
De la Rive,
Mich. Vac.
1782, at
Guildhall.

C H A P. XIX. which he ought not to retain. For the defendant it was said, that he was entitled to keep the premium; and the case of *Lowry v. Bourdieu* was cited; but Lord Mansfield thought it did not apply, as in that case the risk had been run. The point there decided was, that an insurance being made without interest, and the premium paid, the insured shall not recover back the premium, after the ship has arrived safe. And this upon the distinction, that the contract, though not a legal one, *was executed* before the relief was applied for, and no longer *executory*.

Mackenzie
and another
v. Duff,
B. R. Hil-
ary Term
1799.

In a late case, the assured, having been nonsuited at the trial on the ground that the goods insured were prohibited, and that the shipment of them, under the circumstances disclosed, was a violation of the acts of navigation, insisted that they were entitled to a return of premium, and a motion was made to set aside the nonsuit. Had this case proceeded, a decision of the precise question, whether the premium is recoverable in cases of insurance effected contrary to the statute law of the realm, without reference to the distinction between contracts executed and executory, would probably have been obtained: but unfortunately the rule was discharged upon a collateral point, and the main question therefore remained undecided.

Vandyck v.
Hewitt,
1 East's
Rep. p. 96.
See Potts v.
Bell, ante,
p. 116.

In a very late case, the Court of King's Bench, after a consideration of all the cases, held, that where a premium had been paid on a policy to cover a trading with the enemy, though the insurance was void and the underwriters not compellable to pay the loss, it could not be recovered back.

Lord Kenyon, in giving judgment, observed, that it was impossible to distinguish this case from the common one of a smuggling transaction. Where the vendor assists the vendee in running the goods to evade the laws of the country, he cannot recover back the goods themselves, or the value of them. The rule has been settled at all times, that where both parties are *in pari delicto*, which is the case here, *potior est conditio possidentis*.

This point has again come under consideration in two very modern cases, both in the Court of King's Bench and Common Pleas. The decision in the latter court was prior in point of date; and of them the doctrine above stated was fully recognised. In the first case, a foreigner having made

made an insurance upon a *Danish* ship at and from *Bengal* (in which province there are some *Danish* settlements) to *Copenhagen*, and the ship having loaded at *Calcutta*, contrary to the navigation act of 12 Car. 2. ch. 18. s. 1. Lord *Alvanley* and Mr. Justice *Rooke*, and Mr. Justice *Chambre* relied upon the cases of *Andree v. Fletcher*, and *Vandyck v. Hewitt* (ante), and laid down the principle of their decision against the assured's right to recover the premium, as extracted from all the cases, to be, that no man can come into a *British* court of justice to seek the assistance of the law, when he founds his claim upon a contravention of the *British* laws. And a distinction having been attempted at the bar, on the ground of the party interested being a foreigner, it was answered that that could make no difference, as the navigation laws were particularly aimed against foreigners; and that we ought not to relax the rigour of our great political regulations in favour of foreigners offending against them.

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So again in 1806, where an insurance on colonial produce from the *British West Indies* to *Gibraltar* was holden to be void, as a violation of the Acts of Navigation, the Court of King's Bench, consisting of Lord *Ellenborough*, and Judges *Grose*, *Lawrence* and *Le Blanc*, relying on all the above cases, which were quoted from the bar, decided that the premium could not be recovered.

Lubbock
v. Potts,
7 East, 449.

From the various cases upon the subject of return of premium, as well as from all that has already been said, it will appear, that in the *English* law there are two general rules established, which govern almost all cases. The first is, that where the risk has not been run, whether that circumstance was owing to the fault, the pleasure, or will of the insured, or to any other cause, the premium shall be returned. This rule has already been pretty fully discussed. Another rule is, that if the risk has once commenced, there shall be no appointment or return of premium afterwards. Hence in cases of deviation, though the underwriter is discharged from his engagement; yet the risk being once commenced, he is entitled to retain the premium (a).

Cowp. 668.

(a) In the case of *Hogg v. Horner*, (ante, ch. 17.) Lord *Kenyon* being of opinion that there was a deviation, it was insisted that the assured had a right to return premium; but Lord *Kenyon* thought there was an inception of the risk at, and being entire, there could be no return of premium.

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Though these rules are so plain and simple, that they seem to preclude all possibility of-doubt or contention ; yet there are few points in the law of insurance, which have given rise to a greater number of clauses than those which relate to the subject of this chapter.

3 Burr.
1240.

It ought, however, to be acknowledged, that less litigation has taken place in those instances where the whole of the premium is either to be retained or restored, than in those where, from the nature of the agreement between the parties, or the nature of the voyage, the contract becomes divisible, and the court can say, “ a part of the premium shall be retained for the risk run, and part shall be returned, as the risk has never commenced.” This seems to be a refinement upon the rules just established ; but it must at the same time be admitted, that *when it can be accomplished*, it is a refinement perfectly consistent with equity and good conscience. The one rule has provided, that if the risk be once begun, there shall be no return : but the other rule has said, and equity has also said, that a man shall not be paid for a risk which he has never incurred : from whence the deduction is easy and natural, that if there are two distinct points of time, or in effect, two voyages either in the contemplation of the parties or by the usage of trade, and only one of the two voyages was made, the premium shall be returned on the other, although both are contained in one policy.

The first time in which this doctrine was considered at any length, was in a case which came before the Court of King's Bench, in the year 1761.

Stevenson v.
Snow.
3 Burr.
1237. and
1 Blac. Rep.
318. S. C.

It was a special case reserved at a trial at *nisi prius*, before Lord Mansfield, in London, upon an action for money had and received to the plaintiff's use, brought by the plaintiff, the insured, against the defendant, the insurer, for a return of part of the premium. It was an insurance upon a ship, at five guineas per cent. lost or not lost, at and from London to Halifax, in Nova Scotia, warranted to depart with convoy from Portsmouth, for the voyage, that is to say, the Halifax or Louisburgh convoy. Before the ship arrived at Portsmouth the convoy was gone. Notice was immediately given by the insured to the underwriter ; at the same time he was required to make the long insurance,

insurance, or to return part of the premium. The jury find that the usual settled premium from *London* to *Portsmouth* is one and a half *per cent*. They also find that it is *usual* for the underwriter, in such like cases, to return part of the premium; but the *quantum* is uncertain: (And the *quantum* must in its nature be uncertain, because it depends upon uncertain circumstances.) It is stated, that the plaintiff made an offer to the defendant of allowing him to retain one and a half *per cent*. for the risk he had run on such part of the voyage as was performed under the policy, viz. from *London* to *Portsmouth*.

Lord Mansfield.—“ I had not at the trial, nor have now, the least doubt about this question, myself. These contracts are to be taken with great latitude: the strict letter of the contract is not to be so much regarded, as the object and intention of it. Equity implies a condition, “ that the insurer shall not receive the price of running a risk, if he run none.” This is a contract without any consideration, as to the voyage from *Portsmouth* to *Halifax*; for he intended to insure that part of the voyage, as well as the former part of it, and has not. Consequently the insured received no consideration for this proportion of his premium: and then this case is within the general principle of actions for money had and received to the plaintiff’s use. I do not go upon the usage: for the usage found is only that in like cases, it is usual to return a part of the premium, without ascertaining what part. If the risk is not run, though it is by the neglect, or even the fault of the party insuring, yet the insurer shall not retain the premium. It has been objected, that the voyage being *begun* and part of the risk being already run, the premium cannot be apportioned. But I can see no force in this objection. This is not a contract so entire, that there can be no apportionment; for there are two parts in this contract: and the premium may be divided into two distinct parts, relative, as it were, to two distinct voyages. The practice shews, that it has been usual, in such like cases, to return a part of the premium, though the *quantum* be not ascertained. And indeed, the *quantum* must vary as circumstances vary: so that it never can have been fixed with any precise exactness. But though the *quantum* has not been ascertained; yet the principle is agreeable to the sense of mankind.”

C H A P. Mr. Justice *Denison*.—"It is most equitable that the defendant
 XIX. should only retain the premium for such part of the voyage, as
 he has run any risk: the insured has a right to have the other
 part restored to him. This is agreeable to the general principle
 of actions for money had and received to the use of the plaintiff:
 where the defendant has no right to retain, he must refund it."

Mr. Justice *Foster*.—"There is no consideration for the remainder of the premium; for in the voyage from *Portsmouth* to *Halifax*, no risk was run by the insurer, who only insured the voyage *with* convoy; therefore he has no right to retain the premium for this."

Mr. Justice *Wilmot* declared his concurrence most clearly and strongly. "These kinds of contracts," he observed, "are, by the writers on this head, called *contractus innominati*; and the rule, which they lay down concerning them, is, that they are to be determined *secundum bonum et equum*. The jury have here found an usage to return part of the premium in such cases; which is a strong proof of the equity of the thing: and nothing can be more just and reasonable. If the risk was once begun, the insured shall not deviate or return back, and then say, "I will go no further under this contract, but will have my premium returned." But upon this policy there are two distinct points of time, in effect two voyages, which were clearly in the contemplation of the parties; and only one of the two voyages was made; the other not at all entered upon. It was a conditional contract: and the second voyage was not begun; therefore the premium must be returned, for upon this second part of the voyage, the risk never took place at all. This is agreeable to what the writers upon the subject lay down; and is the right and justice of the case." The *possea* was delivered to the plaintiff (a).

Some years afterwards, the principle established in the foregoing case was attempted to be applied to one, which it did not at all resemble. For the following case was an insurance for

This case was much considered in a case of *Rothwell v. Cooke*, 1 Bos. and Pul. 1772. In the Common Pleas, but no decisive judgment delivered on the

twelve months at *9l. per cent.*; and because the ship was captured within two months after the contract was made, a return of premium was demanded, upon the principle of *Stephenson v. Snow*. But the contract in this case was entire; the premium was a gross sum stipulated and paid for twelve months; and the parties, when they made the contract, had no intention or thought of a subsequent division, or apportionment.

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The case was thus :

It was an action, in the usual form, for money had and received to the plaintiff's use, for a return of part of the premium. The cause was tried at *Guildhall*, before Lord *Mansfield*, when, by consent, a verdict was found for the plaintiff, subject to the opinion of the court upon the question, Whether, under the circumstances of the case, a proportionable part of the premium ought to be returned or not? If the court should be of opinion that a proportionable part of the premium ought not to be returned, then a nonsuit was to be entered. It now came before the court upon a rule to shew cause, why a nonsuit should not be entered; and the case, as it appeared from the report, was shortly this. The policy was on the ship *Isabella*, at and from *London*, to any port or place, where or whatsoever, for twelve months, from the 19th of *August* 1776, to the 19th of *August* 1777, both days inclusive, at *9l. per cent.* warranted free from captures and seizures by the *Americans*, and the consequences thereof. In all other respects, it was in the common form, against all perils of the sea, &c. The ship sailed from the port of *London*, and was taken by an *American* privateer, about two months afterwards.

Tyrie v.
Fletcher.
Cowp. 666.

Lord *Mansfield*.—"It was very proper to save this case for the opinion of the court, because in all mercantile transactions, certainty is of much more consequence, than which way the point is decided; and more especially so, in the case of policies of insurance: because, if the parties do not chuse to contract according to the established rule, they are at liberty as between themselves to vary it. This case is stripped of every authority. There is no case or practice in point; and therefore argue from the general principles applicable to all policies of insurance. And I tak

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applicable to this question : the first is, that where the risk has not been run, whether its not having been run was owing to the fault, pleasure, or will of the insured, or to any other cause, the premium shall be returned ; because a policy of insurance is a contract of indemnity. The underwriter receives a premium for running the risk of indemnifying the insured, and to whatever cause it be owing, if he do not run the risk, the consideration, for which the premium or money was put into his hands, fails, and therefore he ought to return it. Another rule is, that if the risk has *once* commenced, there shall be no apportionment or return of premium afterwards. For though the premium is estimated, and the risk depends upon the nature and length of the voyage ; yet, if it has commenced, though it be only for 24 hours or less, the risk is run ; the contract is for the whole entire risk, and no part of the consideration shall be returned : and yet, it is as easy to apportion for the length of the voyage, as it is for the time. If a ship had been insured to the *East Indies* agreeably to the terms of the policy in this case, and had been taken 24 hours after the risk was begun, by an *American* captor, there is not a colour to say, that there should have been a return of premium. So much then is clear ; and indeed, perfectly agreeable to the ground of determination in the case of *Stevens v. Snow*. For in that case, the intention of the parties, the nature of the contract, and the consequences of it, *spoke* manifestly *two* insurances, and a *division* between them. The first object of the insurance was from *London* to *Halifax* : but if the ship did not depart from *Portsmouth* with convoy (particularly naming the ship appointed to the convoy), then there was to be no contract from *Portsmouth* to *Halifax* : why then, the parties have said, “ we make a contract from *London* to *Halifax*, but on “ a certain contingency it shall only be a contract from *London* to “ *Portsmouth*.” That contingency not happening, reduced it in fact to a contract from *London* to *Portsmouth* only. The whole argument turned upon that distinction. Mr. *Fates*, who was counsel for the plaintiff, put it strongly upon that head ; and all the judges, in delivering their opinions, lay the stress upon the contract comprising two distinct conditions, and considering the voyage as being in fact two voyages : and it was the equitable of considering it ; for, though it was at first consolidated by *us*, there was a defeazance afterwards, though not in *think* Mr. Justice *Wilkes* put it particularly upon that ground ;

ground; but it was the opinion of the whole court. There was an usage also found by the jury in that case, that it was customary to return a proportionable part of the premium in such like cases, but they could not say *what* part. The court rejected this as a usage for *uncertainty*; but they argued from it, that there being such a custom, plainly shewed the general sense of merchants, as to the propriety of returning a part of the premium in such cases: and there can be no doubt of the reasonableness of the thing. There has been an instance put of a policy where the measure is by time, which seems to me to be very strong, and apposite to the present case; and that is an insurance upon a man's life for twelve months. There can be no doubt but the risk there is constituted by the measure of time, and depends entirely upon it: for the underwriter would demand double the premium for *two* years, that he would take to insure the same life for *one* year only: in such policies there is a general exception against suicide. If the person puts an end to his own life the next day, or a month after, or at any other period within the twelve months, there never was an idea in any man's breast, that part of the premium should be returned. A case of general practice was put by Mr. *Dunning*, where the words of the policy are, "At and from, provided the ship shall sail on or before the first of *August*:" and Mr. *Wallace* considers in that case, that the whole policy would depend upon the ship sailing before the stated day. I do not think so. On the contrary, I think with Mr. *Dunning*, that cannot be. A loss in port *before* the day appointed for the ship's departure, can never be coupled with a contingency after the day: but if a question were to arise about it, as at present advised, I should incline to be of opinion, that it would fall within the reasoning of the determination of *Stevenson v. Snow*: and that there were two parts, or contracts of insurance with distinct conditions. The first is, I insure the ship in port, provided she is lost in port, before the 1st of *August*: and 2dly, if she be not lost in port, I insure her then during her voyage, from the 1st of *August* till she reaches the port specified in the policy. The loss in port must happen, before the risk upon the voyage could commence: and *vice versa*; the risk in port must cease the moment the risk upon the voyage began. Let us see then, what the agreement of the parties is in the pre-

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proper so to do : but the fact is, that they have made *no division of time at all* ; but the contract entered into is one entire contract from the 19th of *August* 1776, to the 19th of *August* 1777 ; which is the same as if it had been expressly said by the insured, “ If you the underwriter will insure me for twelve months, I will give you an *entire* sum ; but I will not have any apportionment.” The ship sails, and the underwriter runs the risk for *two* months. No part of the premium then shall be returned. I cannot say, if there had been a recapture before the expiration of the twelve months, that the policy would not have revived.”

Mr. Justice *Aston*.—“ This case depends upon the words of the policy : and I am of opinion, it is one entire contract at a certain gross sum of *9l. per cent.* for a certain period of time, *viz.* twelve months ; and that no division is to be implied. The determination in *Stevenson v. Snow* went expressly upon this consideration, that there were *two distinct voyages*, and no consideration received by the insured for the premium upon the second voyage : and there certainly was not ; for there never was any point of time, when any risk was run from *Portsmouth*. In *Bond v. Nutt*, the losses insured against were distinct, and unconnected with each other. 1st, A loss of the ship in port, if any should happen there. 2dly, A loss in the passage home, provided she failed on a certain day. The risk in some policies may be distinct and divisible in its nature. In the case of an insurance on a life, the sum is entire, and time is entire for the whole year. So in this case I think the contract is one entire contract : and therefore that there ought to be no return of pre-

Vide ante,
c. 18. p. 432.

Mr. Justice *Willes* and Mr. Justice *Abbott* were of the same opinion.

Per Curiam. Let a nonsuit be entered.]

In a subsequent case, the Court of King's Bench adopted the same rule of decision, where the ship was insured for 12 months, and the risk ceased at the end of two. A distinction was attempted to be made, because in this case, the whole premium was acknowledged to be received from the insured at the

shewed the parties intended the risk to continue only from month to month. This objection was, however, over-ruled; the Court being of opinion, that the case last reported decided this; and that the 15*s.* per month was only a mode of computing the gross sum. The case was in substance as follows:

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It was an action tried before Lord *Loughborough*, at the assizes for the county of *Northumberland*, in which the plaintiff declared, —That the defendant, in consideration that the plaintiff at his request had underwritten several policies of insurance as to certain sums of money therein subscribed against his name, on the ships, merchandizes, and other things therein respectively specified, without receiving the full premiums therein mentioned, undertook and promised to pay the plaintiff so much money, as the premiums therein mentioned to be paid to him amounted to, with an averment that they amounted to 40*l.* There was another count for 40*l.* for money had and received by the defendant to the plaintiff's use. The defendant pleaded non assumpsit as to all except the sum of 3*l.* upon which plea issue was joined; and as to the 3*l.* he pleaded a tender, and paid that sum into court. Upon the plea of tender, issue was also joined. The jury found a verdict for the defendant upon the tender, and for the plaintiff upon the other issue, for the sum of 15*l.* subject to the opinion of the Court, whether he was entitled to recover that sum of 15*l.* or the sum of 3*l.* only, upon a case, which stated, in effect, as follows: The plaintiff had underwritten 200*l.* on a policy effected at *Newcastle* (which was set forth *verbatim* in the case), whereby the ship the *Chollerford* was insured, against capture by the enemy for twelve months, in the coasting trade between *Leith* and the *Isle of Wight*; beginning the 13th of *March* 1779, and ending the 13th of the same month, 1780. In the body of the policy it was stated, "That the assurers confessed themselves paid the consideration due unto them by the assured, at and after the rate of 15*s.* per cent. per month. At the bottom, opposite to the plaintiff's subscription, was written, premium received 16th of *March* 1779;" and on the back was indorsed, "*Newcastle*, 15th of *March* 1779." "Mr. *John Gaul Tomlinson*, on his ship the *Chollerford*, himself master, for twelve months, in the coasting trade, between *Leith* and the *Isle of Wight*, beginning the 13th of *March* 1779, and ending the 13th of

Lorraine v.
Thomlin-
son, Dougl,
58*g.*

C. H. A. P. " my only. *At 15s. per cent. per month, 18l.*" The premium
XIX. was not paid, though expressed in the policy to have been paid, it being the usage in *Newcastle* not to pay the premium at the time of making the insurance; but at various times after the policies are effected, and sometimes, not till twelve months after. The ship was lost in a storm, within the first two of the twelve months for which the insurance was made, and the defendant tendered to the plaintiff 3l. as the premium for two months. The case then states contradictory evidence given by witnesses on both sides, as to what had been done at *Newcastle* in similar cases; but which I forbear to set down; because the Court of King's Bench was afterwards of opinion, that it ought not to have been received.

After the counsel for the defendant had been heard, the plaintiff's counsel was prevented by the Court from proceeding.

Lord Mansfield.—" This is a mere question of construction, on the face of the instrument, and therefore parol evidence should not have been admitted to explain it. It an insurance for twelve months, for one gross sum of 18l. They have calculated this sum to be at the rate of 15s. per month. But what was to be paid down? Not 15s. for the first month, and so from month to month; but 18l. at once. Two cases have been mentioned. *Stevenson v. Snow* was decided on the ground of there being two voyages. *Tyrie v. Fletcher* is directly in point against the defendant. There are two principles in these cases; 1st, If the risk has never begun, the whole premium is to be returned, because there was no consideration: 2d, When the risk has begun, there shall never be a return, although the ship should be taken in 24 hours."

Mr. Justice Ashurst.—" The 15s. per month is only a mode of computing the gross sum."

Mr. Justice Willes, and Mr. Justice Buller concurring in opinion, the *posse* was delivered to the plaintiff.

2) The two last cases were insurances upon time; but from the
3) paid down in them, and in the former case of *Stevenson*
clear that when the contract is en-
tire

tire, whether it be for a specified time, or for a voyage, there shall be no apportionment or return, if the risk has once commenced. And therefore where the premium is entire in a policy on a voyage, where there is no contingency at any period, out or home, upon the happening or not happening of which the risk is to end, nor any usage established upon such voyages; although there be several distinct ports, at which the ship is to stop, yet the voyage is one, and no part of the premium shall be recoverable.

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A rule had been obtained to shew cause why there should not be a new trial in a case, which had come on before Lord Mansfield at Guildhall, when the jury found a verdict for the defendant. The case was this: It was an action on a policy of insurance, on the French ship *Le Paëtole*, and her cargo, and the voyage was described in the policy in the following words: "At and from Honfleur to the coast of Angola, during her stay and trade there, at and from thence to her port or ports of discharge in St. Domingo, and at and from St. Domingo back to Honfleur." The clause respecting the premium was as follows: "Slaves valued at 800 livres Tournois per head; the ship at 145*l.* sterling; other goods, &c. as interest may appear; at a premium of 11 per cent." The ship sailed to Angola, and from thence, after staying some time there, to the West Indies. On her way to Angola, she put in at Cayenne, on the coast of America, and from Cayenne went to Martinico, confessedly out of the way to St. Domingo. In this cause, the first question was a question of fact, not material to our present enquiry, viz. Whether the course taken was a deviation, or not, from the voyage insured? After all the evidence had been heard, the jury thought it was, and accordingly found a verdict for the defendant. Upon their declaring this opinion, the counsel for the plaintiff insisted, that as there was a count in the declaration for money had and received, the voyage insured ought to be considered as composed of three distinct parts or voyages; namely, from Honfleur to Angola; 2dly, from Angola to St. Domingo; and 3dly, from St. Domingo to Honfleur; and that, as the voyage from St. Domingo to Honfleur had never commenced, the premium ought to be apportioned, and a return made of that was paid to insure the risk from St. Domingo to Honfleur. Mansfield took the opinion of the jury.

Berm n v.
Woodbridge,
Doug. 781.

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they were clear there ought to be no return. Next day, however, his Lordship said, he had turned that question in his mind, and that he entertained some doubts upon it, and as it was a question of law, desired Mr. *Lee* to move for a new trial on that ground. It was, however, afterwards moved on both grounds; namely, on the question of fact, whether the deviation was wilful: and 2dly, On the question of law, whether, supposing it wilful, there ought to be a return of premium.—These questions were fully discussed by three advocates on each side; and the Court also took time to deliberate upon them: after which the Lord Chief Justice delivered the unanimous opinion of the whole court.

Lord *Mansfield*, after stating that, upon the question of fact, they were perfectly satisfied with the verdict of the jury, proceeded thus: "If, however, the plaintiff should succeed on the second point, the determination would virtually allow him a new trial on the whole of the cause, because no special case was reserved. But, on the fullest consideration, and after looking into all the cases (though my opinion has fluctuated), we are now all clearly of opinion, that there ought not to be any return. The question depends upon this: Whether the policy contains one entire risk on one voyage, or whether it is to be split into six different risks; for, by splitting the words, and taking "at" and "from" separately, it will make six, viz. 1st, *At Honfleur*; 2d, *From Honfleur to Angola*; 3d, *At Angola*, &c. The principles are clear. Where the risk has never begun, there must be a return of premium; and if the voyages, in this case, are distinct, the risk from *St. Domingo* to *Honfleur* never began. On the other hand, if the risk has once begun, you cannot sever it, and apportion the premium. In an insurance upon a life, with the common exceptions of suicide, and the hands of justice, if the party commit suicide, or is executed in twenty-four hours, there shall be no return. The case is the same if a voyage insured is once begun. Is this one entire risk? The insured and insurers consider the premium as an entire sum for the whole, without division: it is estimated on the whole at 11l. per cent. And, which is extremely material, there is no where any contingency, at any period, out or home, mentioned in the policy, threatening or not happening, is to put an end to the insurance. argument must be, that, if the ship had been taken

taken between *Honfleur* and *Angola*, there must have been a return. By an implied warranty, every ship must be sea-worthy when she first sails on the voyage insured, but she need not continue so throughout the voyage; so that, if this is one entire voyage, if the ship was sea-worthy when she left *Honfleur*, the underwriters would have been liable, though she had not been so at *Angola*, &c.; but according to the construction contended for on behalf of the plaintiff, she must have been sea-worthy, not only at her departure from *Honfleur*, but also when she sailed from *Angola*, and when she sailed from *St. Domingo*. The cases of *Stevenson v. Snow* and *Bond v. Nutt*, were quite different from this. They depended upon this, that there was a contingency specified in the policy, upon the not happening of which the insurance would cease. In *Stevenson v. Snow*, it depended on the contingency of the ship sailing with convoy from *Portsmouth*, whether there should be an insurance from that place. This necessarily divided the risk, and made two voyages. In *Bond v. Nutt*, it was held, that there were two risks, upon the same principle. "*At Jamaica*" was one; the other, viz. the risk "*from Jamaica*," depended on the contingency of the ship having sailed on or before the first of August: that was a condition precedent to the insurance on the voyage from *Jamaica* to *London*. The two cases of *Tyrie v. Fletcher*, and *Lorraine v. Thomson*, are very strong, for, if you could apportion the premium in any case, it would be in insurances upon time. Therefore, on very full consideration, we think this one entire risk, one voyage, and that there can be no return of premium." The rule was discharged.

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Vide ante,
C. 12.

Accordingly in another action for return of premium, tried before Mr. Justice *Willes*, on the northern circuit, where a verdict had been given for the plaintiff, upon a motion to set aside the verdict, and to enter a non-suit, a decision, similar to that of *Bermon v. Woodbridge* was made. The insurance was "*At and from Jamaica to Liverpool, warranted to sail on or before the first of August, premium twenty guineas per cent. to return eight, if she sailed with convoy.*" The ship did not sail till September and was lost. The jury apportioned the premium, and gave the plaintiff a verdict for eight guineas, the defendant having paid eight for the convoy into court, which was allowing risk run by the defendant at *Jamaica*.

Meyer v.
Gregson,
B R. East.
24 Geo. III.

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Lord *Mansfield* —“ It would be endless to go into enquiries about the risk at *Jamaica*. It appears on the evidence to be different on different sides of the island. Besides the parties have divided the risk, with respect to convoy; for it is a premium of twenty guineas, to return eight, if she sail with convoy: but there is an absolute warranty as to the sailing, and nothing said of the premium.”

Mr. Justice *Willes* thought the premium should be apportioned.

Mr. Justice *Abbott* and Mr. Justice *Buller*, agreed with Lord *Mansfield*, the latter observing, that as the parties have not considered it as two risks, nor estimated the risk at *Jamaica*, the court cannot do it for them. In all the insurances from *Jamaica*, the policy runs “at and from,” and though in many instances the voyage has not begun, yet there never was an idea of the premium being returned, and that no usage was found by the jury. The rule for entering the judgment of nonsuit was made absolute.

Vide *supra*.

I am aware that the decision in this case may seem to clash with what fell from Lord *Mansfield*, in delivering his opinion in the case of *Tyrie v. Fletcher*, in which he put a supposed case of an insurance “at and from, *provided* the ship shall sail on or before the first of *August*.” In such a case, his Lordship observed, *as then advised*, he should incline to think it a divisible risk. In this place, it would be sufficient to observe, in answer to such an objection, that the opinion then delivered by Lord *Mansfield* was a mere *obiter dictum* upon a point, arising only in the course of argument; in which case the greatest abilities are liable to mistake. But his Lordship delivered that opinion, with a wise and prudent reservation, that, *as at present advised*, he thought so and so: and it reflects no discredit upon any man, however renowned for knowledge, to alter an opinion, upon mature deliberation. There is, however, one very obvious distinction, upon which the Court relied much, between *Meyer v. Gregson*, and the case put in *Tyrie v. Fletcher*: for in the latter, the insured has used a most significant word (*provided*) to mark the difference

a return of premium, in case the ship fails with convoy; Why did he not use the same precaution, lest she should not fail by the day limited? Having done it in the one case, it is to be presumed he did not mean to do it, or that the insurer would not consent that it should be done, in the other: and as the parties had not divided the risk themselves, the court could not do it for them.

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In another case upon an insurance "at and from any port or ports in *Jamaica* to *London*, following and commencing on her first arrival there, warranted to sail with convoy from the place of rendezvous to *Great Britain*," the same questions were again agitated. But as the counsel differed upon the evidence given at the trial, the main question was not fully discussed by the court, but was sent back to a new trial.

Gale v.
Machell,
B. R. Est.
25 Geo. III.

The last case upon this subject was also an action for a return of the premium. The policy was "at and from *Jamaica* to *London*, warranted to depart with convoy for the voyage, and to sail on or before the 1st of *August*, upon goods on board a ship called the *Jamaica*, at a premium of 12 guineas *per cent*." The ship sailed from *Jamaica* to *London* on the 31st of *July* 1782, but without any convoy for the voyage. At the trial before Lord *Mansfield*, the jury found a verdict for the plaintiff, subject to the opinion of the court upon a case, stating the facts already mentioned. In addition to which, they *expressly* find, that it is "the constant and invariable usage in an insurance, at and from *Jamaica* to *London*, warranted to depart with convoy, or to sail on or before the 1st of *August*, when the ship does not depart with convoy, or sails after the 1st of *August*, to return the premium, deducting one half *per cent*."

Long v.
Allen, B. R.
Est. Term,
25 Geo. III.

Lord *Mansfield*.—"An insurance being on goods warranted to depart with convoy, the ship sails without convoy; and an action is brought to recover the premium. The law is clear, that if the risk be commenced, there shall be no return. Hence questions arise of distinct risks insured by one policy or instrument. My opinion has been to divide the risks. I am aware that there are great difficulties in the way of apportionment, and therefore the court has sometimes leaned against them. But where an express usage is found by the jury, the insured. They offered to prove the facts."

C H A P. *Indies in general; but I stopt them, and confined the evidence*
 XIX. *to Jamaica."*

Mr. Justice *Willes*, and Mr. Justice *Ashburß*, concurred with his Lordship.

Mr. Justice *Buller*.—"The counsel for the defendant did right in his argument to make the chief question, Whether parol evidence of this usage ought to have been received? In mercantile cases from Lord *Holt's* time, and in policies of insurance in particular, a great latitude of construction as to usage has been admitted. By usage, places come within the policy, which are not expressed in words; usage explains and even controuls the policy. The usage here found by the jury is universal: and though in some cases one half *per cent.* may be a small premium for the risk *at*; yet the underwriters are aware that it is so. In *Meyer v. Gregson*, no usage was found. Besides in cases of this kind, where every thing is left to the whim and caprice of a jury, I lean much against them. Here a general and certain usage is found; and no inconvenience can result from it." The *posse* was delivered to the plaintiff.

From the tenor of all these cases it should seem, as Lord *Mansfield* said in the case of *Long v. Allen*, that so many difficulties occur in apportioning the premium, that the courts are often obliged to decide against it, unless there be some usage upon the subject. Even in the case of *Stevenson v. Snow*, the jury found that it had been usual to divide the risk; and although the court rejected the usage for uncertainty, because it did not ascertain what proportion of the premium should be returned; yet they expressly say, that it serves to shew what the idea of the mercantile world is upon the subject. If, indeed, we look back to all the cases reported in this chapter, we never find an apportionment take place, except in *Stevenson v. Snow*, and *Long v. Allen*, on account of the difficulty, unless there be some usage, as in those cases, to guide and direct the judgment of the court: and of late years one has known no instance of an apportionment occur.

For this chapter is concluded, it will be proper to observe, the case of *Bond v. Nutt*, which was so often mentioned in the text, as upon apportionment, the question never

never arose. In that case, the two material questions were, as C H A P. XIX.
may be seen by a reference to it in the two preceding chapters of
this work, whether the ship had complied with a warranty of
sailing by a particular day : and whether in going to the place
of rendezvous for convoy, she was guilty of a wilful deviation.
It was proper to mention this, to prevent misconstruction ; and
it was also taken notice of by Mr. Justice *Buller*, in the case of
Long v. Allen.

CHAPTER THE TWENTIETH.

Of the Proceedings upon Policies of Insurance.

C H A P.
XX.Vide the In-
troduction.

IN the present chapter, it is intended to point out in what manner, and by what form of legal proceeding, a man, who has insured property, and has sustained a loss, is to recover against the underwriters upon the policy. We have formerly seen, that the Court of Policies of Insurance fell into disuse, and the reasons why it did so : since which period all questions of this nature have been decided by the usual mode of trial, known to the laws and constitution of this country, namely, the trial by jury in the courts of common law. Cases of this nature are not the subject of enquiry even in a court of Equity, because the demand is plainly a demand at law ; and the loss and damage sustained are as much the object of proof by witnesses, as any other species of damage whatever. This was decided by a decree of Lord Chancellor *King*, whose opinion was afterwards confirmed by the House of Lords.

De Ghetoff
and others
v. the Go-
vernor and
Company of
the London
Assurance,
3 Brown's
Parl. Cases,
525.

In the year 1720, some merchants at *Osford* set up a trade to the *East Indies* ; and amongst others, one *James Maelcamp* equipped a ship, called the *Flandria*, for a voyage to *China*, wherein several persons were concerned. *Maelcamp* had the care and direction of the ship, and gave receipts to the several persons concerned, for the monies they paid, promising to be accountable to them for their respective proportions of the net profit of the voyage. These transactions being carried on mostly at *Osford* or *Antwerp*, the several persons, who had a mind to be concerned in the undertaking, gave directions to their correspondents at those places, to pay *Maelcamp* what sums they thought fit, and to take his receipts for the same. The Appellants gave directions to one *Conninck* to pay several large sums to *Maelcamp* on account of the said undertaking ; and accordingly *Maelcamp* paid him divers sums, amounting to 35,000 guilders, same, according to the proportion

tion for which the appellants were concerned therein: he also, by the order and direction of the appellants, and for their use or benefit, agreed with the respondents to insure on the said ship the *Flandria*, 500*ol.* and by a policy, dated the 26th day of December 1720, this insurance was effected, at a premium of 12*l. per cent.*. The ship sailed from *Ostend*, in order to proceed to *China*; but on her way was seized at *Bencoolen*, in the *East Indies*, by the governor, being an *English* settlement, and the ship and cargo were confiscated. The appellants, upon notice of this event, applied to the respondents for payment of the 500*ol.* insured, and produced to them the several receipts for their respective interests in the ship, and affidavits affirming the several sums therein mentioned, to have been really and *bonâ fide* paid. But the respondents refusing to pay, or make any satisfaction to the appellants, they brought their bill in the Court of Chancery, against the respondents, and the said *Conninck*, praying, that the respondents might be decreed to pay the appellants the said sum of 500*ol.* with interest, according to their several and respective shares and proportions thereof. To this bill, the respondents put in a demurrer and answer, and to such part of the bill, as sought to compel them to pay the appellants the 500*ol.* or to make them any satisfaction for any loss, which had happened to the ship, they demurred; and for cause of demurrer shewed, that if the policy of insurance in the bill mentioned was forfeited, a proper action at law lay to recover the money due thereupon; and that the appellants, if they were entitled to such relief as they prayed by their bill, might have their complete and adequate remedy by an action at law, where such matters were properly cognizable, and where the appellants ought to prove their interest in, and the loss of the ship. The demurrer came on to be argued before Lord Chancellor King, when his lordship ordered it to stand over for two months till *Conninck's* answer should come in; and if the appellants did not procure such answer in two months, the demurrer was to be allowed. *Conninck* accordingly put in his answer within two months, and thereby admitted, that he made the assurance in his own name, in trust and for the benefit of the appellants; but said he did not care to permit the appellants to bring any action against the respondents in his name; he being advised, that if any such action should be brought and they should not prevail therein, he would be personally liable for costs and charges occasioned in consequence thereof.

CHAP. XX. of the demurrer it was urged, that the appellants' demand was plainly a demand at law, as they had nothing to prove but their interest, and the loss of the ship, which were facts proper to be tried by a jury. That there was no equity suggested by the bill, but a pretended difficulty to produce witnesses: and that their trustee refused to permit them to bring an action in his name: that the former objection might with equal reason be suggested in almost every case of a policy of insurance; and the latter appeared manifestly to be thrown into the bill, merely to change the jurisdiction, and it was in a great measure falsified by the trustee's answer, for he did not say that he ever refused, but only that *he did not care to permit his name to be made use of*. If bills of this kind were encouraged, it would be easy to bring all sorts of property to be tried in a court of Equity.

Upon these reasons, Lord King allowed the demurrer; and upon an appeal to the House of Lords, after hearing counsel upon it, it was ordered and adjudged, that the same should be dismissed; and the order complained of, affirmed.

There may, it is true, be cases, where an application to a court of Equity on the part of the insured, is strictly proper, and will be entertained. For instance, if the trustee in a policy of insurance do actually refuse his name to the *cestui que trust* in an action at law, there may be some pretence for going into a court of Equity, as Lord Hardwicke has once observed. Or, if from a concurrence of circumstances, the persons, whose testimony is requisite to the decision of some disputed facts, reside abroad, the Court of Chancery will grant a commission to examine those witnesses. But it is not upon a mere general trust, or the loose suggestions of any of these facts, that this extraordinary interposition will take place.

1 Atk. 547.

2 Atk. 359.

There are also cases, in which the insurers may go into equity, to obtain injunctions to stay the proceedings against them at law: as in the last case mentioned, where the evidence of persons, abroad is requisite for their defence; in which situation, they shall have a commission to examine witnesses abroad, and an injunction to stay proceedings at law in the mean time. Another application to a court of Equity, is a suspicion of fraud, which I fear the charter

on fraud produces too many instances: in such cases the court will compel the party charged to make a full disclosure upon oath of all the circumstances that are within his knowledge; and to deliver up all papers and documents, that are at all material to the question. But except in these instances, all issues upon policies of insurance must be tried in the courts of common law. Even if the parties, by a clause in the policy, agree that in case of a dispute, it shall be referred to arbitration, that will not be a sufficient bar to an action at law; provided no reference has been in fact made, nor is depending.

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Vide c. 10.

Thus in an action upon a policy of insurance it appeared, that a clause was inserted, that in case of any loss or dispute about the policy, it should be referred to arbitration: and the plaintiff averred in his declaration, that there had been no reference. Upon the trial at *Guildhall*, the point was reserved for the consideration of the court, whether this action would lie before a reference had been made; and it was held by the whole court, that if there had been a reference depending, or made and determined, it might have been a bar; but the agreement of the parties cannot oust this court; and as no reference has been, nor any is depending, the action is well brought, and the plaintiff must have judgment.

Kill v.
Hollister,
1 Wils. 129.
In Thompson v. Char-
nock,
8 Term Rep.
139. it was
held that a
covenant in
a deed to re-
fer all mat-
ters is not
sufficient to
oust the
courts of law
and equity
of their ju-
risdiction.

Having thus seen in what courts the party injured in the contract of insurance is to seek for redress, let us now consider, by what form of action that redress is to be obtained. The act of parliament, by which the two Insurance Companies were erected, ordered, that they should have a common seal, by affixing which, all corporate bodies ratify and confirm their contracts. Hence a policy of insurance made by the *Royal Exchange Assurance Company*, or the *London Assurance Company*, is a contract under seal; and if the contract is broken, the proceedings against these Companies must be by action of debt or covenant. From this circumstance a great inconvenience arose; for under the plea of the general issue to an action of debt or covenant, the true merits of the case could seldom come in question: but in order to bring them forward, it became necessary to plead specially. This was attended with such a heavy expence, such great delay, and frequent applications to courts of equity for relief, that

6 Geo. I.
c. 18.

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“ *debt* to be sued or commenced against either of the said cor-
 “ porations, upon any policies of insurance under the common
 “ seal of such corporations, for the assuring of any ship or ships
 “ goods or merchandizes at sea, or going to sea, it should and
 “ might be lawful to and for the said corporations, in such
 “ action or suit, to *plead generally, that they owed nothing* to the
 “ plaintiff or plaintiffs in such suit or action; and that *in all*
 “ *actions of covenant*, which should be sued or commenced against
 “ either of the said corporations upon any such policy of assu-
 “ rance under the common seal of such corporation for the assu-
 “ ring of any ship or ships, goods or merchandizes, at sea or
 “ going to sea, it should and might be lawful for the said respec-
 “ tive corporations, in such action or suit, to plead generally,
 “ *that they had not broke the covenants*, in such policy contained,
 “ or any of them; and if thereupon issue should be joined, it
 “ should and might be lawful for the jury, if they should see
 “ cause, upon the trial of such issue, to find a verdict for the
 “ plaintiff or plaintiffs in such suit or action, and to give so
 “ much, or such part only of the sum demanded, if it be an
 “ action of debt, or so much in damages, if it be an action of
 “ covenant, as it should appear to them, upon the evidence
 “ given upon such trial, such plaintiff or plaintiffs ought in
 “ justice to have.”

36 Geo. III.
c. 26.

In a subsequent act of parliament the following clause is in-
 “serted, “ that if any action or suit shall be commenced, brought,
 “ or prosecuted against the corporation of the *Royal Exchange*
 “ assurance of houses and goods from fire, by any person or
 “ persons, bodies politick or corporate, for or concerning any
 “ assurance or assurances by the said recited charter, or hereby
 “ authorised to be made, or relating to the powers hereby
 “ granted, or concerning any other matter or thing herein or
 “ in the said charter above recited contained, the said corpora-
 “ tion and their successors may in such action or suit plead the
 “ general issue, and give the special matter in evidence.”

The charter recited in the act is that, which enabled the com-
 pany to make insurances for lives and against fire; and therefore
 it should seem (a similar act having passed respecting the *London*
Insurance Company) that in insurances on lives, and insurances
 against fire, both these companies may plead the general issue,
 and by virtue of the statute 31 Geo. 2. in cases of ma-

Since the three first editions of this work were published, an act of parliament passed, enabling his majesty to incorporate, by charter, a company to be called, *The Globe Insurance Company*, which charter shall empower them to make insurances upon lives; or on houses, warehouses, goods, ships, vessels, barges and other craft, with their cargoes, in port, or used on navigable canals, farming stock, and all other property, against loss or damage by fire, within *Great Britain or Ireland*, and any other parts abroad, within his majesty's dominions or not; and for other purposes hereafter to be mentioned in their proper place. I only allude to this new corporation at present, for the purpose of stating, that by the 9th section of the act of incorporation above quoted, the same pleas, and the same power to the jury to assess the damages which shall actually appear to be due, are given, in the case of *The Globe Insurance Company*, as were given to the *Royal Exchange* and *London Assurance Companies* by the acts lately recited. Thus it stands with respect to the corporations.

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39 Geo. III.
c. 83
Sec. 2.

Wherever the contract of insurance is entered into with a private underwriter, it is done by the insurer merely subscribing his name to the instrument, which is no more than what is called by the lawyers a simple contract; the remedy for a breach of which is by an action of *assumpsit*, or an action upon the case founded upon the *promise* and undertaking of the insurer. There are, however, it is to be observed, two kinds of actions of *assumpsit*: the one, what is denominated a general *indebitatus assumpsit*, in which the plaintiff states generally, that the defendant, *being indebted* to him in so much money for goods sold, &c. or for money lent to the defendant, or for money had and received to the use of the plaintiff, in consideration thereof, *undertook and promised* to pay the amount; the other is called a *special assumpsit*, which must always be founded on some particular or special agreement. The former can never be used as the means to recover upon a policy of insurance. The only cases, in which it can be at all used with respect to this contract are, where money has been paid by mistake to the insured by the insurer, upon the supposition of a loss, when in fact there was none; a rule which holds, whether the money was paid through the fraud or mistake of the receiver: or where the insured wishes to recover back the premium which he has paid to the insurer. In these proper mode is to bring an action of *indebitatus assumpsit*.

3 Black.
Com. 157.

2 Salk. 22.
Skinner,
412.

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ney had and received to the plaintiff's use : and therefore in almost all actions upon policies of insurance, it is usual after the count for the special *assumpsit*, to add one or two general counts; that if the policy should be set aside, and the contract declared void, the insured may at least be enabled to recover the premium.

Vide ante,
C. I. p. 33.

It being thus evident, that the proper form of action, in order to recover upon a policy of insurance, is a special *assumpsit*, founded upon the express contract of the person who signs it; it will follow as an immediate consequence, that the first thing which is necessary for the plaintiff to insert in his declaration, or state of the case, will be the policy itself, because that is the foundation of the whole. He should also state, that it was signed by the defendant. The next averment will be, that in consideration of the premium being paid, the defendant had undertaken to indemnify against the losses specified in the policy. We saw in the first chapter of this book, that the premium was the consideration upon which the whole contract rested; and that by the custom, the receipt of the premium was acknowledged in the body of the policy. It is then necessary for the plaintiff to allege that goods and merchandizes were laden on board to the amount of the sum insured, and that the plaintiff was interested therein; or if the insurance be upon the ship, the insured's interest must, in the same manner, be averred (a). The next material averment is, that the property insured was lost, and by what means that loss happened; in stating which, the plaintiff must bring it within one of the perils insured against by the policy: but he must always state it according to the truth. Thus he ought to shew, that it was by perils of the sea, by capture, by fire, by detention, by barratry, or any of the other perils mentioned in the policy.

Where the loss had been by *barratry*, the breach was thus assigned, the proceedings being at that time in *Latin*, *per fraudem*.

(a) In *Nantes v. Thompson*, 2 East's Rep. 385. the Court of King's Bench unanimously decided, after time taken to deliberate, and after two arguments at the bar, that a declaration on a policy of insurance need not aver any interest in the assured, though there be no such words as "interest or no interest" in the policy. This case has been removed by error into the Exchequer Chamber; but though it has been twice removed thence, yet been pronounced, 1809.

sem et negligentiam magistri navis depressu et submersa fuit, et totaliter perdita et amissa fuit, and it was insisted, that this was not within the meaning of the word *barratry*, but the breach should have been express, that the ship was lost by the *barratry* of the master.

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The Court were unanimously of opinion, that there was no occasion to aver the fact in the very words of the policy ; but if the fact alleged came within the meaning of the words in the policy, it was sufficient. Barratry imports fraud, and he that commits fraud, may properly be said to be guilty of a neglect, namely, a breach of duty.

It is true that the practice at present, as I have reason to believe from precedents which I have seen settled by the ablest special pleaders, is to aver such a loss to have happened "by the barratry of the master or mariners."

If the plaintiff in his declaration allege, that a total loss has happened, and lay the damages as for a total loss, it shall be no bar to his recovery, though he can only prove a partial loss ; for in an action for damages merely, a man may always recover *less*, but never *more* than the sum he has laid in his declaration. A contrary doctrine was once attempted to be maintained ; but was unanimously over-ruled.

See the statutes just quoted as to the corporations, upon this point.

The case, in which it was so determined, came before the Court upon a question reserved by Lord Mansfield at *Nisi Prius* at *Guildhall*, upon an action on the case, on a policy of insurance. The insurance was made upon one-fourth part of the ship *Encouragement*, and of its cargo, from *Greenland* to *London*, free from average under a certain value, from the ice. The plaintiff declared upon a total loss of the ship ; the declaration expressly stated a total loss of it ; and the damages were laid for a total loss. But the evidence only proved an average or partial loss ; it was not attempted to prove a total one ; and it was only shewn that the ship had received *some* damage, which little more than 50*l.* would have repaired. The defendant's counsel objected at the trial, "that this evidence did not support the plaintiff's declaration." They also represented the practice to be on their side ; namely, that proof of a

Gardiner v.
Croftendale,
2 Burr. 904.
1 Blac. Rep.
193.

C H A P. XX. to maintain a declaration for a total loss. A verdict was taken for 20*l.* as for an average loss : but it was agreed on both sides that the verdict should be subject to the opinion of the Court, "Whether it was maintainable in point of law." If the Court should be of opinion that it was, the verdict was to stand ; but if the Court should be of a contrary opinion, the plaintiff was to have a judgment of nonsuit against him.

Lord Mansfield.—“ At the trial it appeared to me, and so the jury thought, that the present case could *not* be considered as a total loss. The defendant's counsel objected, as they do now, that the jury could not take a partial loss into their consideration, upon an express declaration for a total loss : and I understood from them, that the practice supported their objection. Mr. Norton, who was counsel for the plaintiff at the trial, then argued to the contrary upon principles : and he also cited the case of *Walker v. the Royal Exchange Assurance Company*. But that case does not prove much ; for that was a total loss. I was satisfied upon the principles, provided the practice did not interfere with them, which I was then told it did. I chose to put it in such a shape, that the opinion of the Court might be had without delay or expence. No hardship was done to the defendant upon the *quantum* of the damages found : for the plaintiff took a great deal *less* than it clearly appeared on the evidence that the loss amounted to. I cannot hear of any such determination as can support the objection that has been made by the defendant's counsel. Therefore it stands singly upon principles. And upon principles it is extremely clear, that the plaintiff may, upon this declaration, recover damages for a *partial* loss. This is an action upon the case, which is a liberal action ; and a plaintiff may recover *less* than the grounds of his declaration support, though *not more*. This is agreeable to justice, and consistent with his demand. Here are two grounds of the plaintiff's declaration ; namely, the policy, and the damage to the ship. As to its being a total or a partial loss, that is a question more applicable to the *quantum* of the damages, than to the ground of the action. The ground of the action is the same, whether the loss be partial or total ; both are perils within the policy. As to the defendant's not coming prepared to defend a partial loss : this indeed would be an objection if it were true. But the defendant does not come prepared to shew, that either no damages had

happened at all; or at least, that damages have not happened to such a degree as the plaintiff has alleged in his declaration; or, that he did not sign the policy. As to the effects of a judgment by default, the defendant could not have been hurt by a judgment by default. For the plaintiff could not have recovered, even upon a writ of enquiry, any greater damages than he could prove to the jury sworn to assess them, that he had actually suffered. If the present objection were to prevail, it would introduce the addition of unnecessary counts in declarations, and an enormous swelling of the records of the court. It is more convenient to lay the case short, than prolix. There is no proof of any practice contrary to the principles. It was the apprehension of such contrary practice, that was the only occasion of my having any doubt at the trial. I am now fully satisfied, that the plaintiff may recover either the *whole* or *less* than he has laid; and therefore this verdict ought, in my opinion, to stand. In an ejectment for more, the plaintiff may recover less: it is every day's practice." C H A P.
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Mr. Justice *Denison* concurred, and thought it a very plain case. It is an action for *damages* for the loss of the ship. Now, in an action for damages, the plaintiff is to recover his damages according to his proof, *pro tanto*; but he is not, in an action for damages, obliged to prove all that he has alleged. If it had been an action of covenant for pulling down a house, would not the plaintiff be entitled to recover damages for pulling down *half* the house, provided he had proved that the defendant did it? This is no variance of the evidence from the declaration; the evidence tends, in a certain degree, to the proof of what is alleged in the declaration; it is not necessary to lay two counts in such a declaration as this.

Mr. Justice *Foster* was of the same opinion.

Mr. Justice *Wilmot*.—"In actions for damages, the plaintiff may recover all, or for any part: the damages are severable, and may be given *PRO TANTO*. Here damages are laid for a *total* loss which is only the measure of the damages: and the plaintiff proves a *partial* loss; which only affects the measure of the damages, but is no variance from the allegation contained in the declaration. If this had been a

C H A P. XX. plaintiff could not, even in that case, have recovered damages for *any more* loss than he was able to prove under the writ of enquiry of damages. And as to the defendant's not having sufficient notice that he should come prepared to defend against a partial loss, I think he had sufficient notice to come thus prepared: for he ought to come prepared to prove, "that no damage at all happened." If *any* at all happened, he will be liable *pro tanto*, if it be proved."

The *posse* was delivered to the plaintiff.

Page v. Fry.
2 Bos. & Pu 1.
240.

In a declaration on a policy, the plaintiff, who was an agent, averred in his declaration, that Mess. *Hyde* and *Hobbs* were at the time of loading, at the time of subscribing the policy, and until the time of the loss, interested in the commodity insured to a large amount, viz. to the amount of all the money ever insured thereon; and that the policy was made for their use, risk, and benefit. It appeared in evidence that, *prior to the policy*, *Hyde* and *Hobbs* had permitted another mercantile house to take a joint concern in the corn: and it was objected that the fact so proved was in direct contradiction to the averment in the declaration.

But Lord *Eldon*, *Heath*, *Rooke* and *Cromb*, Justices, were of opinion, that there was a sufficient interest throughout the entirety of this cargo, notwithstanding other persons had a beneficial interest in a part, to support the averment in the declaration; and that the spirit of the act of the 19 Geo. 2. only requires that the policy shall not be a gaming policy (a).

An attempt was also once made to nonsuit a plaintiff, because the declaration alleged that he had a smaller interest than he appeared in proof to have. But this attempt also failed.

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It was an action on a policy of insurance, in which the declaration stated, that the plaintiff was possessed of one third of the

(a) Since this decision, and since the former edition, I have found a MS. case of *Barrett v. Barrett*, at Guildhall, December 1747, in which Lord Chief Justice *Lee* held *ISS. ponsu mo.* And see also *Perchard v. Whitmore*, 2 Bos. & Pull. 155, where Justice held, that if *A.* and *B.* declare upon a policy, and aver the loss, it is not a fatal variance, though it shall appear that *C.* be-
and before the action was begun.

ship on which the insurance was made. It was proved that the plaintiff had purchased the whole ship at one period; and as there was no evidence to shew that he had since parted with any share of it, the counsel for the defendant insisted, that the plaintiff had not proved his declaration, which alleged him to have but one third.

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Lord Mansfield over-ruled the objection, saying, that this was *prima facie* sufficient evidence; for *omne majus continet in se minus* (a).

We have seen that policies of insurance are seldom effected by the party himself really interested, but generally by the intervention of a broker employed by the insured, who transacts the business with the underwriters as attorney for his principal, from whom he receives his instructions, and from which, if he deviate, he is answerable to his employer in an action on the case; like any other person who undertakes any office, employment, trust, or duty, and who thereby impliedly undertakes to perform it with integrity, diligence, and skill (b). It is also common for the broker to open the policy in his own name, at the same time declaring for whose use, benefit, or interest, the same is made; how far such declaration is necessary we have formerly explained. As the policy may be made in the name of the broker, so also may the action be brought in his name, as was done in the case

3 Blackst.
Com. 163.

25 Geo. III.
c. 24.
Vide ante,
c. 1. p. 17.
and see also
28 Geo. III.
c. 56. ante, p. 19.
1 Burr. 490.
Vide ante,
c. 15.

(a) But if the plaintiff in this case had the whole ship, it seems that he could never bring another action for the other two thirds; because that would be a splitting of actions.

(b) As the brokers transact the chief part of the business, and generally pay the premiums, the law has given them a lien upon the policies in their hands, so as to enable them to deduct out of any monies they may receive for the assured, not only the premium and commission due on the particular policies, but the general balance due to them on the account between them and their principals. And it has also been decided, that if a broker should part with the possession of the policy, so as to lose his lien upon, it; yet if it get back into his hands for any purpose whatever, the lien revives. These points were settled in the case of *Whitbread v. Vaughan*, Trin. 25 Geo. 3. in B. R. and of *Parker and others v. Carter*, in C. P. Trinity 1788: both of which cases are stated at length in *Mr. Cooke's* book on the Bankrupt Laws, 4th edit. p. 579. But if the policy was effected by an agent in his own name, he being an *Englishman*, telling the broker, that the property was *neutral*, and to warrant it to be so, this was held to be a sufficient notification to the broker that the party acted only as agent, and therefore no action by the foreign principal against the broker, he can only set off the money due for the particular premium, and not the general balance due from the *English* agent. *Mason v. Henderson*, 1 East's R. 335.

C H A P. of *Godin* and the *Royal Exchange Assurance Company*, and a variety of other cases.
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As this contract depends so much upon the purest good faith, and the most liberal communication of circumstances, relative to each particular case; when gaming insurances, without interest, were abolished by the legislature, in order effectually to answer the purpose intended, it became necessary to order that a disclosure of all insurances, effected on the same property, should be made even after an action brought.

19 Geo. II. Thus it was declared, "That in all actions or suits brought
c. 37. f. 6. " or commenced by the assured, upon any policy of assurance,
" the plaintiff in such action, or suit, or his attorney or agent,
" should, within fifteen days after he or they should be required
" so to do in writing by the defendant, or his attorney or agent,
" declare what sum or sums he had assured, or caused to be as-
" sured in the whole, and what sums he had borrowed at re-
" spondentia or bottomry, for the voyage in question in such suit
" or action."

In addition to this very wise provision, it having appeared to the legislature, that some vexatious persons, notwithstanding the perfect willingness of the insurers to pay losses, to which they were liable, still persevered in bringing actions, by which the defendants were put to great and heavy charges, and had no means of paying the money into court; it was therefore enacted,
25 Geo. II. "That it should and might be lawful for any person or persons,
c. 37. f. 7. " body or bodies corporate, sued in any action or actions of
" debt, covenant, or any other action or actions, on any policy
" or policies of insurance, to bring into court any sum or sums of
" money; and that if any such plaintiff or plaintiffs should refuse
" to accept such sum or sums of money so brought into court as
" aforesaid, with costs to be taxed, in full discharge of such
" action or actions, and should afterwards proceed to trial in
" such action or actions; and the jury should not assess damages
" to such plaintiff or plaintiffs, exceeding the sum or sums of
" money so brought into court, such plaintiff or plaintiffs, in
" every such case and cases should pay to such defendant or de-
" fendants, in every such action or actions, costs to be taxed;
" law, custom, or usage, to the contrary notwithstanding."

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Vide supra.

These preliminary steps being taken, the defendant is to put in his plea to the charge or declaration of the plaintiff; which, by the act of parliament, is prescribed to the Assurance Companies, when they are defendants; namely, that they owe nothing, if the action be debt: or if it be covenant, that they have not broken the covenants, which they had undertaken to keep. But in the case of a private insurer, as the action is merely an *assumpsit*; so the answer to it is *non assumpsit*; that is, the defendant has not promised as the plaintiff has alleged. Under this plea, the defendant will have a right to take advantage of all those circumstances, which, as we have seen, will either render the policy void, or make it of no effect: such as fraud, want of interest, not being sea-worthy, deviation, non-performance of warranties, and all other grounds stated in former chapters.

Issue being thus joined between the parties, the next object for our consideration is the proof, which it will be necessary for the plaintiff to produce, in order to support his case. This enquiry will be rendered very easy, by reflecting upon those allegations, which, as we have before shown, it is incumbent upon the plaintiff to insert in his declaration. We have seen, that the policy must be set out in the declaration; and consequently the first evidence to be given, is, that the defendant's hand-writing is subscribed to the policy (a). This, in the liberality of modern practice, is seldom required to be done; as the subscription is usually admitted; but in strictness, it may be insisted on: and in a work of this nature, it is my business to point out every thing, which

(a) It is now frequently the practice to subscribe policies by an agent of the underwriter: and therefore where that is the case, in strictness, the authority of the agent ought to be proved. This in fact is seldom insisted upon, the parties in general, when they defend a cause of this nature, intending to try some real or supposed question, either of law or fact. But experience in Courts of Justice informs us that such defences are sometimes made. So a few years ago an action was brought upon a policy, in which the policy was subscribed by one *Hutchins*, for the defendant. The witness said he did not know by what authority, but that *Hutchins* was in the constant habit of subscribing policies for the defendant, and had done several for the witness, and for others, to his knowledge. It was objected that *Hutchins* might have done this by some limited power of attorney; which ought therefore to be produced. But Lord *Kerzon* overruled the objection, being of opinion, that the acts of *Hutchins* held him out to the world as properly authorised, and having subscribed several policies was sufficient to charge the defendant, who and the plaintiff, ought to prove his a

C H A P. either party is expected, or compellable to perform. When the
 XX. signature is once proved, the Court and jury are in possession of the extent of the contract (except as it may be further extended by *usage*), the conditions to be performed on either side; and all the other circumstances relative to the risk insured. And although in the course of our enquiries, we have seen frequent instances where the usage and practice of a particular trade controul and extend the written words of a policy; yet in no case shall evidence of any agreement be allowed, which directly tends to contradict the policy; for to suffer them to be defeated by agreements by parol, not appearing, would be greatly to diminish their credit, and to render them of no value.

Kaines v.
 Knightly,
 Skinner, 51

Thus in an action upon a policy of insurance "*from Archangel to Leghorn*," the defendant said, that the agreement before the subscription was, that the adventure should begin, *but from the Downs*; but this agreement was not put into writing. Lord Chief Justice *Pemberton* said, that policies were sacred things; and that a merchant should no more be allowed to go from what he had subscribed in them, than he that subscribes a bill of exchange, payable at such a day, shall be allowed to go from it, and say, it was agreed to be on a condition, when it may be that the bill had been negotiated: for though neither of them are specialties, yet they are of great credit, and much for the support, conveniency, and advantage of trade. The jury, notwithstanding this direction, found for the defendant: but afterwards there was a trial at bar, and a verdict was given for the plaintiff, according to the opinion of the Court.

Vide c. 1.

The policy not only proves the extent and nature of the contract; but it also establishes another allegation in the plaintiff's declaration, namely, *that the premium was paid*: for it was formerly shewn, that every policy contains the following clause: "*confessing ourselves paid the consideration due unto us for this assurance by the assured, at and after the rate of per cent.*"

The plaintiff having averred in his declaration, that he is interested to the amount of the property insured, it is absolutely necessary that this allegation should be proved. This he must do by the production of all the usual documents, such as the bills of lading, and the costs of the outfit: the bills of lading

lading (a), signed by the master, specifying the goods received on board, and for whom he is to carry them, custom-house clearances, and every other paper, which may be thought necessary to substantiate his right to the property (b). So if the assured has exercised acts of ownership, in directing the loading, &c. of the ship; and paying the people employed, this has been held to be *prima facie* sufficient proof of ownership in the vessel (c).

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The agent or broker of the assured having shewn to the underwriter the protest of the captain, stating the circumstances of the

Senat v.
Porter,
7 Term Rep.
153.

(a) In addition to the bill of lading, &c. it is usual to call the captain or some other person to prove that the goods mentioned in it were actually on board. The first great cause, in which the law relative to bills of lading came much under discussion, was in a modern case of *Caldwell* and others v. *Ball*, reported very much at length, and with great accuracy in 1st Term Reports, p. 205. That case was fully argued at the bar, and very much debated on the bench. Amongst other things the court held, that a bill of lading is an acknowledgment under the hand of the captain, that he has received such goods, which he undertakes to deliver to the person named in the bill of lading: that it is assignable in its nature; and by indorsement the property is vested in the assignee. That where several bills of lading of the same date, but of different imports, have been signed, no reference is to be had to time, when they were first signed by the captain: but the person, who first gets one of them by a legal title from the owner or shipper, has a right to the consignment. And where such bills of lading, though different upon the face of them, are constructively the same, and the captain has acted *bona fide*, a delivery according to such legal title will discharge him from them all. But if the intention of the parties appears to have been to bind the net proceeds only, in case of the arrival of the goods, an insurance made on account of the indorser, after such indorsement, is good.

M'Andrew
v Bell,
1 Esp. Rep.
373

Hibbert v.
Carter,
1 Term Rep.
745.

(b) Two partners purchased a ship under a regular bill of sale, conformable to the 26 Geo. 3. ch. 60. (Lord *Hawkebury's* act.) They afterwards took in two other partners, who paid their respective shares in the ship, but there was no transfer to them under the direction of the statute: and it was held that the four partners had not an insurable interest in the freight; for as the right of freight results from the right of ownership, these four partners had not shewn in themselves jointly (as laid in the declaration) either a legal or equitable title to the ship. *Camden* and others v. *Anderson*, 5 Term Rep. 709. and *Marsh v. Robinson*, 4 Esp. Rep. 93. Acc.

(c) *Amery v. Rodgers*, 1 Esp. Rep. 207. and frequently since in many cases, particularly in *Robertson v. French*, (4 East's Rep. 130.) which, upon other points, was much discussed. (See ante, p. 60.) But the whole Court held, Lord *Ellenborough* delivering the judgment, that the property of the ship may be proved by parol evidence of the possession of the assured, unless disproved by the production of the written documents of the ship under the Register Acts. And it was also held that such parol evidence of ownership, arising from possession at a particular period, was not disproved by proof of a prior register in the name of another, and a subsequent re-register in the name of the assured, under a decree of the Vice-Admiralty Court, that the

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The same doctrine had been previously held by Lord Kenyon in *Christian v. Combe*, 2 Esp. R. 489.

loss of the ship insured, and demanding payment, it was held by the Court, on a motion for a new trial, that the delivery of this paper to the defendant did not entitle him to read it, as evidence of the facts contained in it; though had the captain been called to give a different account of the loss from that contained in the protest, it might have been produced to shew that *he* was not worthy of credit: but it could not be read on the part of the defendant to prove any fact in the case.

Wright v. Barnard, Sitt. after Mich. 1798, at Guildhall.

So also in an action on a policy on the ship, a condemnation of the vessel by a Court of Vice-Admiralty abroad for insufficiency, after a survey had upon oath, was offered in evidence by the underwriters, to prove that there were defects in the ship, from which, want of sea-worthiness at a prior time was meant to be inferred; but Lord *Kenyon* rejected the sentence, as *evidence of the facts contained in it*; though he admitted it to be read to prove the mere fact of a condemnation having taken place: and this, notwithstanding an order of the Court of Exchequer, directing that it should be admitted in evidence.

Ruffel v. Boheme, 2 Stra. 1127.

A man having purchased goods beyond sea, in order to prove his property in the cargo, in an action upon a policy of insurance, produced a *bill of parcels* of one *Gardiner* at *Peterburgh*, with his receipt to it, and proved his hand. The defendant objected, that this was no evidence against the insurers; but the Lord Chief Justice allowed it.

Sir William Lee.

Smith v. La Celler, 2 Term Rep. 187.

Before the subject of interest is entirely closed, I will take the opportunity of mentioning, what I omitted in a former chapter, that if a merchant abroad, who is interested in goods and the freight of a cargo, mortgage them to his creditor here for payment of money at a certain day, and by a letter, inclosing the bills of lading, direct an insurance, the mortgagor has still an insurable interest, although the mortgage was become absolute, before the letter directing the insurance was received: and therefore an action was held to lie against the agent for not insuring agreeably to the instructions contained in such letter.

be strictly adhered to; for otherwise the insurers would come into court prepared to defend themselves against one charge, and one species of loss; and they would then be obliged to resist a demand upon a quite different ground. This appeared clearly in a modern case.

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It was an action on a policy of insurance, which came on to be tried before Mr. Justice *Buller*, who nonsuited the plaintiff. Upon a motion to set aside that nonsuit, the following report was made by the learned judge. The insurance was upon goods on board the ship *Emanuel*, at and from *Falmouth* to *Marseilles*, warranted a *Danish* ship; and on the policy was this memorandum: "The following insurance is declared to be on money expended for reclaiming the ship and cargo valued at the sum, which shall be declared hereafter. The loss to be paid, in case the ship does not arrive at *Marseilles*, and without further proof of interest than this policy; warranted free from all average, and without the benefit of salvage." It appeared that the plaintiffs were proprietors of the cargo but not of the ship. That the ship originally sailed with the cargo on board from *Riga* to *Marseilles*, and that an insurance had been effected at *Bremen* upon the cargo for that voyage; in the course of which she was taken, and brought into *Falmouth*, by an *English* privateer. That a sentence of condemnation had been there obtained, which was afterwards reversed upon the prize having been proved to be a neutral ship, but the expences of procuring that reversal were ordered by the Admiralty Court to be a charge upon the cargo. The plaintiff's agents accordingly paid the sum of 1,031*l.* 14*s.* for the expences of reclaiming the ship and cargo; and immediately procured the policy in question to be effected in *January* 1781, according to the purport of the memorandum. In the *February* following, the ship set sail from *Falmouth* with the original cargo on board, in the prosecution of her voyage to *Marseilles*; but on the 26th of the same month, before her arrival there, was captured by a *Spanish* ship, and carried into *Ceuta* in *Spain*, where she was again condemned. An appeal was brought in the superior court of *Madrid*, which promising to be of long continuance, the cargo, which was of a perishable nature, was ordered to be sold, and the proceeds to be brought into court to wait the event of the suit. In *May* 1782, the vessel was restored by sentence of the court, and the cargo was

Kulen
Kemp v.
Vigne,
1 Term Rep.
304.

C H A P. XX. which arose from the sale of the cargo, was paid to the owners, deducting the expences incurred in *Spain* in prosecuting the appeal. After all the charges paid, there only remained twenty-six rix dollars. As soon as the ship was liberated she sailed from *Ceuta* to *Malaga*, in order to refit, and having there made the necessary repairs, set sail for *Bremen*, and in that voyage was lost. The insurance made upon the cargo at *Bremen* has been paid. The declaration averred, that “*whilst the ship was proceeding in her said voyage from Falmouth to Marseilles, and before she could arrive at Marseilles, she was captured by the Spaniards, and thereby the said ship, and also the goods and merchandizes on board her, were totally lost to the plaintiffs.*” At the trial it was objected on the part of the defendant, 1st, That this was not an insurable interest; and 2dly, That the plaintiffs could not recover upon the policy in this form of declaring, for they stated the loss to have happened *by capture*; whereas, though the vessel was captured, yet, having been afterwards restored, she might have reached her destined port, notwithstanding the capture, in which case the underwriters would have been discharged by the terms of the memorandum. I was of that opinion, and upon the last ground I nonsuited the plaintiffs.

This case was very fully argued both upon the merits, and the formal objection, after which all the Judges spoke upon the question.

Lord Mansfield.—“A loss accrued upon the cargo in the voyage: the underwriter is sued and the loss is averred in the declaration to be *by capture*. The fact of the case is, that the ship was taken by a *Spanish* privateer, but was afterwards restored, and in a condition to pursue the voyage, and was afterwards lost in another voyage.”

Mr. Justice Willes.—“Upon this case it is clear, that the plaintiffs cannot recover. In the first place, there was certainly a deviation, for the ship set sail for *Malaga* instead of proceeding to *Marseilles*. Secondly, the plaintiff has declared for a loss *by capture*: but after the capture, the policy might still have been relied with by the ship’s going to *Marseilles*; and therefore it had to have happened by that circumstance.”

Mr. Justice *Ashurst* and Mr. Justice *Buller* also delivered their opinions, agreeing with Lord *Mansfield* and Mr. Justice *Willes* upon the formal objection; and both went much at large into the merits, upon which I forbear to follow them or the Chief Justice, as what passed upon that subject is not material to our present enquiry.

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But where a loss is averred to be by perils of the sea, and some of the goods insured are spoiled, and others saved, it is allowable to give the expence of the salvage in evidence upon such an averment, because it is a consequence of the accident laid in the declaration.

In an action on a policy of insurance, for insuring goods on board the ship *A*. the plaintiff declares that the ship sprung a leak, and sunk in the river, whereby the goods were spoiled. The evidence was, that many of the goods were spoiled, but some were saved; and the question was, Whether the plaintiff might give in evidence the expence of salvage, that not being particularly laid as a breach of the policy in the declaration?

Cary v.
King, Cal.
tempi Hard.
B. R. 304.

Lord *Hardwicke* Chief Just.—“I think they may give it in evidence; for the insurance is against all accidents. The accident laid in this declaration is, that the ship sunk in the river; it goes on and says, that by reason thereof the goods were spoiled, that is the only special damage laid: yet it is but the common case of a declaration that lays special damage, where the plaintiff may give evidence of any damage that is within his cause of action as laid. And though it was objected, that such a breach of the policy should be laid, as the insurer may have notice to defend it; it is so in this case, for they have laid the accident, which is sufficient notice, because it must necessarily follow, that some damage, did happen.”

CHAPTER THE TWENTY-FIRST:

Of Bottomry and Respondentia.

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XXI.2 Blackst.
Com. 457.2 Blackst
Com. 458.2 Valin
Com p 4.

THE contract of bottomry is in the nature of a mortgage of a ship, when the owner of it borrows money to enable him to carry on the voyage, and pledges the keel or *bottom* of the ship, as a security for the repayment; and it is understood, that if the ship be lost, the lender also loses his whole money; but if it return in safety, then he shall receive back his principal, and also the premium or interest stipulated to be paid, however it may exceed the usual or legal rate of interest. When the ship and tackle are brought home, they are liable, as well as the person of the borrower, for the money lent.—But when the loan is not made upon the vessel, but upon the goods and merchandizes laden thereon, which, from their nature, must be sold or exchanged in the course of the voyage, then the borrower only is *personally* bound to answer the contract; who therefore in this case is said to take up money *at respondentia*. In this consists the difference between *bottomry* and *respondentia*; that the one is a loan upon the ship, the other upon the goods: in the former the ship and tackle are liable, as well as the person of the borrower: in the latter, for the most part, recourse must be had to the person only of the borrower. Another observation is, that in a loan upon bottomry, the lender runs no risk, though the goods should be lost; and upon respondentia, the lender must be paid his principal and interest, though the ship perish, provided the goods are safe. But in all other respects, the contract of bottomry and that of respondentia are upon the same footing; the rules and decisions applicable to one, are applicable to both; and therefore, in the course of our enquiries, they shall be treated as one and the same thing, it being sufficient to have once marked the distinction between them.

These terms are also applied to another species of contract, which does not exactly fall within the description of either; it is a contract for the repayment of money, not upon the ship, but upon the mere hazard of the voyage.

age itself; as if a man lend 1000*l.* to a merchant to be employed in a beneficial trade, with a condition to be repaid with extraordinary interest, in case a specific voyage named in the condition shall be safely performed: which agreement is sometimes called *fœnus nauticum* or *usura maritima*. But as this species of bottomry opened a door to gaming and usurious contracts, especially in long voyages, the legislature, at the time it suppressed insurances upon wagering policies, introduced a clause, by which it was enacted, "that all sums of money lent on bottomry, or at respondentia, upon any ship or ships belonging to his Majesty's subjects, bound to or from the East Indies, should be lent only on the ship, or on the merchandize or effects, laden or to be laden, on board of such ship, and should be so expressed in the condition of the said bond; and the benefit of salvage should be allowed to the lender, his agents or assigns, who alone shall have a right to make assurance on the money so lent; and no borrower of money on bottomry, or at respondentia, shall recover more on any insurance than the value of his interest in the ship, or in the merchandizes and effects laden on board thereof, exclusive of the money so borrowed; and in case it should appear that the value of his share in the ship or in the merchandizes or effects laden on board of such ship, did not amount to the full sum or sums he had borrowed as aforesaid, such borrower should be responsible to the lender for so much of the money borrowed, as he had not laid out on the ship or merchandizes laden thereon, with lawful interest for the same, in the proportion the money not laid out should bear to the whole money lent, notwithstanding the ship and merchandizes should be totally lost."

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Molloy, lib.
2. c. 11. f 3.

19 Geo. II.
c. 37. l. 5.

This statute has entirely put an end to that species of contract which was last mentioned, namely, a loan upon the mere voyage itself, as far, at least, as relates to *India* voyages; but as none other are mentioned, and as *expressio unius est exclusio alterius*, these loans may be made in all other cases, as at the Common Law, except in the following instance, which is another statute prohibition. The statute alluded to declares, that all contracts made or entered into by any of his Majesty's subjects, or any persons in trust for them, for or upon the loan of monies by way of bottomry, or any ship of foreigners, and bound or designed to

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This act, it should seem, does not mean to prevent the king's subjects from lending money on bottomry on foreign ships trading from their own country to their settlements in the *East Indies*. The purpose of the statute was only to prevent the people of this country from trading to the *British* settlements in *India* under foreign commissions, and to encourage the lawful trade thereto.

Sumner v.
Green, 1 H.
Blackitt. 302.

It lately became a question in the Court of Common Pleas, whether an *American* ship, since the declaration of *American* independence, was a *foreign* ship, within the statute of the 7 *Geo. 1. ch. 21. s. 2*. It came before the court, upon a motion to discharge the defendant out of custody upon entering a common appearance. The defendant was held to bail upon a respondentia bond, which was executed by the defendant, who was an *American*, to secure the payment of a cargo shipped by the plaintiff on board an *American* ship in the *East Indies*, homeward bound from *Calcutta* to *Rhode-Island* in *America*. The ship had sailed from *England*, and landed a cargo of *European* goods in *Bengal*, previous to her taking in the cargo, on which the bond was given.

The Court were much inclined to think the bond was void, the case being within the mischief designed to be remedied by the act. But as the question was of considerable consequence, they thought it not proper to be discussed on this summary application: but they ordered the defendant to be discharged on the ground, that where it appeared from the affidavit to hold to bail, that there was a probability of the contract being void, on which the action was founded, it would be wrong to detain the defendant in prison: more particularly as the plaintiff would by such means have an opportunity of tampering with the defendant in prison, and of escaping from the penalties of the act, by preventing the case from being brought before the court.

A loan upon the voyage, without a security on the ship or goods, is entirely prohibited by the laws of *France*; for in the nine ordinances of that country, there is a general regulation near to that now here with respect to *India* ships; "Faisons
deniers a la grosse sur le corps et quille du
marchandises de son chargement de la

"de leur valuer, au peine d'être contraint, en cas de fraude, au paiement des sommes entières, non obstant la perte ou prise du vaisseau." And in another place it is said, that where a greater sum is borrowed than the ship or goods are worth, where there is no fraud, the contract is void, except as to the amount of the real value of the ship or goods. If then the contract be only binding as far as there is property to answer the loan, it follows that, by the laws of *France*, this contract cannot exist upon the hazard of the voyage merely, unless there be a security also upon the ship or goods.

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Loc. cit.
art. 15.

The contract of bottomry and respondentia seems to deduce its origin from the custom of permitting the master of a ship, when in a foreign country, to hypothecate the ship in order to raise money to refit. Such a permission is absolutely necessary, and is impliedly given him in the very act of constituting him master, not indeed by the Common Law, but by the Marine Law, which in this respect is reasonable; for if a ship happen to be at sea, and spring a leak, or the voyage is likely to be defeated for want of necessaries, it is better that the master should have it in his power to pledge the ship and goods (a) or either of them, than that the ship should be lost, or the voyage defeated. But he cannot do either for any debt of his own: but merely in cases of necessity, and for completing the voyage. Although

2 Blackst.
Com. 457.Barnard v.
Bridgman,
Moor, 918.
fully reported
in Ho-
bart, p. 12.Molloy, b. 2.
c. 2. l. 14.
Leg. Oler.
art. 1 & 22.

(a) That the master might hypothecate the goods, as well as the ship, in cases of necessity, depended till lately more upon a general understanding that such hypothecation might be made, than upon any very direct authority upon the point. In a note to a case in Salkeld, it is said that the master may hypothecate either ship or goods; for the master is entrusted with both, and represents the traders, as well as the owners of the ship.

Justin vs
Ballam,
1 Salk. 341

But in a late case in the High Court of Admiralty in *England*, this question has undergone all that elaborate and learned discussion which the abilities of the advocates of that court were so competent to afford it; and has met with a decision, confirming the above note of *Justin v. Ballam*, formed upon mature deliberation and solid argument, as will appear from the judgment pronounced by the eminent person who presides in that court. It was my intention to have given an abstract of the judgment: but an abridgment would have done great injustice to the argument of that learned judge; and therefore I content myself with having referred to the subject as so settled, and having pointed out to the reader the valuable reports in which the arguments both of the judge and advocates may be found at large. The extent of that decision seems to be that the master of a vessel, carrying a cargo on freight, may, in a foreign port, hypothecate that cargo for the repairing damages sustained by it, in a foreign port, such being absolutely necessary for the purpose of delivering the cargo.

The ship
Gratitudine,
3d vol. of
Robinson's
Admiralty
Rep p. 240.

C H A P. XXI. the master of the vessel has this power while abroad, because it is absolutely necessary for purposes of commerce and navigation; yet the very same authority which gave that power in those cases, has denied it when he happens to be in the same place where the owners reside. Thus the laws of *Oleron*, in the place above cited, speak of the captain being in a foreign country, and first writing home to his owners for money, before he takes money on bottomry: and the laws of the *Hanse Towns*, which were founded on those of *Oleron*, speak the same language; for they say, "a master being in a *strange country*, if necessity drive him "to it, may take up money on bottomry, if he cannot get it "without, and the owners shall bear the charge." In addition to this, from all the cases, which have been determined at the Common Law upon the subject, it may be inferred that the ship should be abroad, as well as in a state of necessity, to justify the captain or master in taking money on bottomry. *Molloy* in express terms declares, that a master has no power to take up money on bottomry, in places where his owners dwell; otherwise he and his estate must be liable thereto.—If, indeed, the owners do not agree in sending the ship to sea, the majority shall carry it, and then money may be taken up by the master on bottomry for their proportion who refuse, although they reside upon the spot, and it shall bind them all. The two last rules are the same with the marine ordinances of *France* upon that point: for they also declare, that those who lend money to the master, in the place where the owners reside, without their consent, shall have no security or hypothecation, but on such part of the ship only as belongs to the master himself, even though the money was advanced for repairs, or for purchasing provisions. But that the shares of those owners, who refuse to send out the ship, shall be affected by the loan of money to the master for necessities. The justice and propriety of such a regulation, are evident from considering that such a contract was only intended for the benefit of all parties in those places where the owners had neither a residence, nor any correspondents.

Laws of the
Hanse
Towns,
art. 60.

Hobart, 11.
Noy, 95.

Molloy, l. 2.
c. 11. f. 11.

Molloy loc.
cit.

Ord. of Lou.
14. tit.
Avert à la
grosle, art.
8 &

a Vélis
Com., 10.

The contract of which we treat is of a different nature from most all others: but that which it most nearly resembles is the contract for the lender on bottomry or at response: all the same risks, with respect to the profit on the loan is made, that the insurer does with

respect to the effects insured. There are, however, some considerable distinctions; for instance, the lender supplies the borrower with money to purchase those effects upon which he is to run the risk: not so with the insurer. There are also various other distinctions.

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But however similar they may be in other respects, they differ very much in point of antiquity. We have formerly endeavoured to show that the contract of insurance was certainly unknown to the traders of the ancient world: but it is equally clear that with the contract of bottomry and respondentia, or what was equivalent to it, they were perfectly acquainted. In those fragments of the famous sea laws of the *Rhodians*, which have been preserved and transmitted to our times, I think there are very evident traces of this species of contract. In one section it is said, "that when masters of ships, who are proprietors of one third of the lading, take up money for the voyage, whether for the outward or homeward bound, or both; all transactions shall pass according to the writings drawn up between the master and lender, and the latter shall put a man on board the ship to take care of his loan." But in another place, these laws speak more explicitly, and with a direct reference to the distinction between naval interest, and that which is given for a land risk. "If masters or merchants borrow money for their voyages, the goods, freights, ships, and money, being free, they shall not make use of suretyship, unless there be some apparent danger either of the sea or of pirates. And for the money so lent, the borrowers shall pay *naval interest*." From these two quotations, little doubt can be entertained, but that the *Rhodians* used to borrow and lend, upon the hazard of the voyage, for an increased premium. It was formerly seen that the *Rhodian* laws in general were adopted by the *Romans*; and consequently that branch of them, which relates to bottomry amongst the rest; for you can hardly open a book upon the *Roman law*, but you meet with chapters, *de nautico fœnore, de nauticis usuris*, which plainly show that this contract was well known to the jurists of that distinguished nation. It was also called by them *pecunia trajecititia*: because it was given to the borrower to be employed by him in commerce and business by the sea. It appears from *Valin*, that some have supposed, that this contract was

Vide the Introduction.

Leg. Rhod.
l. 1. art. 28.

Leg. Rhod.
l. 2. art. 16.

CHAP. XXI. the ancients, and that it was peculiar to *France* alone. *Valin* very clearly exposes the absurdity of such an idea; and it seems to be sufficiently answered, if deserving of an answer, by what has been already said. In addition to this we may add, that so far from being peculiar to *France*, it has obtained a place in the codes of all the maritime states, whose laws have been promulgated, or have been at all famous in the modern world. In this chapter we have already had occasion to cite two passages from Art. 1 & 23. the judgments, or laws of *Oleron* upon the subject, as well as the 60th article of the laws of the *Hanse* towns: and by a reference to the 45th article of the laws of *Wijbury*, it will be found, that the nature of bottomry, as well as its name, was perfectly known to the makers of those ordinances.

Laws of
Wijb. art.
45.

In the *Guidon*, indeed, it is supposed that the contract of bottomry now in use, is not at all the same as that which was known to the ancients. This authority is respectable: but facts must speak for themselves; in addition to which, the celebrated Emerigon, *Emerigon* has observed, that the assertion of the author of the *Guidon* is only true with respect to the form which the modern regulations have given to this contract, the true origin of which is lost in its antiquity.

Le Guid.
c. 18. art. 2.

Emerigon,
p. 384.

In our definition of bottomry it was said, that if the ship arrive safe, the lender shall be paid his principal, and the stipulated interest due upon it, however much it exceed the legal rate. The true principle, upon which this is allowed, is not merely the great profit and convenience of trade, as has frequently been urged; but the risk which the lender runs of losing both principal and interest; for he runs the contingency of winds, seas, and enemies. It is therefore of the essence of a contract of bottomry, that the lender runs the risk of the voyage; and that both principal and interest be at hazard; for if the risk go only to the interest or premium, and not to the principal also, though a real and substantial risk be inserted, it is a contract against the statute of usury, and therefore void. This has been frequently so determined in our courts of law; and it is consonant to the ideas

Molloy,
lib. 2. c. 11.
§ 3. 13.
¶ Vol. 148.

¶ Vol. 154.

went to fish in *Newfoundland*, (which voyage might be performed in eight months,) and that the plaintiff delivered 50*l.* to the defendant, to pay 60*l.* upon the return of the ship off *Dartmouth*: and if the said ship, by occasion of leakage or tempest, should not return from *Newfoundland* to *Dartmouth*, then the defendant should pay the 50*l.* only; and if the ship never returned, he should pay nothing. And it was held by all the court, not to be usury within the statute. For if the ship had stayed at *Newfoundland* two or three years, he should have paid at the return of the ship but 60*l.*: and if the ship never returned, then nothing; so that the plaintiff ran the hazard of having less than the interest which the law allows; and possibly, neither principal nor interest.

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This case was, upon another occasion, mentioned in argument by one of the judges on the bench; the principle on which it was decided, was recognized, and the case itself allowed to be law.

Roberts v.
Tremayne,
Cro Jac.
508.

So also in another case of debt upon an obligation, conditioned to pay so much money, if such a ship returned within six months from *Ossend in Flanders* to *London*, which was more by the third part than the legal interest of money; and if she do not return, then the obligation to be void: the defendant pleaded that there was a corrupt agreement betwixt himself and the plaintiff, and that at the time of making the obligation, it was agreed betwixt them, that he should have no more for interest than the law permits, in case the ship should ever return; and avers that the obligation was entered into by covin, to evade the statute of usury, and the penalty thereof: upon this averment the plaintiff took issue, and the defendant demurred.

Joy v. Kent,
Hard. Rep.
418.

Lord Chief Baron *Hale*.—"Clearly this bond is not within the statute, for this is the common way of insurance; and if this were void by the statute of usury, trade would be destroyed: It is not like to the case, where the condition of the bond is to give so much money, if such or such a person be then alive; for there is a certainty of that at the time. But it is uncertain and a casualty whether such a ship shall ever return or no."

In another case of debt upon an obligation, conditioned to pay so much money, if such a ship returned within six months from *Ossend in Flanders* to *London*, which was more by the third part than the legal interest of money; and if she do not return, then the obligation to be void: the defendant pleaded that there was a corrupt agreement betwixt himself and the plaintiff, and that at the time of making the obligation, it was agreed betwixt them, that he should have no more for interest than the law permits, in case the ship should ever return; and avers that the obligation was entered into by covin, to evade the statute of usury, and the penalty thereof: upon this averment the plaintiff took issue, and the defendant demurred.

C H A P. and returned safe ; or if the owner, or the goods laden on board
XXI. the ship returned safe, then the defendant was to pay the principal to the plaintiff, and 40*l.* for each 100*l.* ; but that if the ship should perish by unavoidable casualties of sea, fire, or enemies, to be proved by sufficient testimony, then the plaintiff should have nothing. The doubt was, whether this was an usurious contract : and it was said to be so, because the payment depended upon so many things, one of which, in all probability would happen. But the whole court held it not to be within the statute.

Lord Chief Justice *Bridgman* took a distinction between a bargain of this kind and a loan ; for where there is a bargain, as here, and the principal is hazarded, that cannot be within the statute of usury ; but it is otherwise of a loan, where the principal is not in danger. Here there are apparent risks of the sea, fire, and enemies, and the length of the voyage ; all of which endanger the loss of the principal. These bottomry contracts are for the advancement of trade, and therefore judgment must be for the plaintiff.

These cases are all uniform in the principle which they go to establish, that, on account of the risk, the interest shall be larger than the common rate : but notwithstanding this, a case is to be found in the Equity Reports, which directly tends to destroy the rule of decision in all these cases.

*Dandy v.
Turner,
2 Equity
Cases Abr.
372.*

A part owner of a ship borrowed money of the plaintiff upon a bottomry bond, payable on the return of the ship from the voyage she was then going in the service of the *East India Company*, who broke up the ship in the *East Indies* ; and the owners brought their action against the Company, and recovered damages, which did not, however, amount to a full satisfaction. The plaintiff brought his bill to have his proportionable satisfaction out of the money recovered ; but his bill was dismissed, and he was left to recover as well as he could at law ; for a court of equity will never assist a bottomry bond, which carries *unreasonable interest*.

a very unmerited censure upon bottomry
warranted by the long chain of uniform deci-

sions in their favour. Indeed, from the very nature of the contract, they are to carry the naval interest, which is always greater than land interest, in proportion as the risks run by the lender on bottomry are much greater than those which a lender upon common bonds incurs (a). C H A P.
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To be sure if a contract were made, by colour of bottomry, in order to evade the statute, it would be usurious and void, and highly deserving of all the censure and discouragement which the courts, either of law or equity, could possibly throw upon it. 4 Com. Dig.
193.
2 Ves. 146.

In *England* then it is clear, from these cases, that there is nothing unlawful in the contract of bottomry: but some writers in foreign countries have endeavoured to hold it up to the world, as an illicit and an usurious bargain. *Straccha*, who has written upon insurances, has introduced a long dissertation to prove the truth of this position; and several other writers have either preceded or followed him in support of the same doctrines. If, indeed, the money so lent were given merely by way of a loan, and such excessive interest were demanded for the use of the money only; there might be force in the objection. But when it is considered as the price of the great risks incurred, it has not the least semblance of usury; it is a fair and conscientious contract, highly beneficial to the commerce and general interests of society. Introd. de
Assicur.
No. 26.

These authors have met with very able opposers in *Pothier* and *Emerigon*, who have clearly shewn the fallacy of their doctrine; and they have proved to demonstration, that even the fathers of the church have acknowledged, that this contract has nothing in it offensive to religion or good morals. Almost all the writers of eminence agree with the two last named, as to the legality of loans on bottomry and at respondentia: and it is now universally admitted and practised in all the maritime and trading countries in *Europe*. Pothier
Aventure
à la grosse,
Not. 2.
2 Emer. 390.
Loccenius,
lib. 2. c. 6.
Not. 36.
Roccus de
Navibus et
Navio, Not.
50 2 Black.
Com. 1

(a) Mr. *Fonblaque*, in his valuable edition of "A Treatise of Equity," has supposed that in the above passage I meant to complain of the interference of a Court of Equity in cases where exorbitant naval interest was demanded. I have little attended to the passage complained of, and also to what follows, which is intended to shew that the law is not to be extended to general censures upon a species of contract so highly useful. See *Fonbl.* vol. i. p. 243.

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But as the hazard to be run is the very basis and foundation of this contract; it follows, that if the risk is not run, the lender cannot be entitled to the extraordinary premium; for that would be to open a door to means by which the statutes of usury might be evaded. This was so decided in the Court of Chancery.

Deguilder v.
Drepper,
1 Vern. 263.

The case was upon a bottomry bond, whereby the plaintiff was bound in consideration of 400*l.* as well to perform the voyage within six months, as at the six months' end to pay the 400*l.* and 40*l.* premium, in case the vessel arrived safe, and was not lost in the voyage. It happened that the plaintiff never went the voyage, whereby the bond became forfeited, and he now preferred his bill to be relieved. Upon the former hearing, as the ship lay all the time in the port of *London*, and there was no hazard of losing the principal, the Lord Keeper thought fit to decree, that the defendant should lose the premium of 40*l.* and be contented with his principal and *ordinary interest*. And now, upon a rehearing, he confirmed his former decree.

Pothier
Traité à la
Grosle
Aventure,
Not. 38.
a Valin, 10.

With this decree, which is equitable and just, the *French* writers agree. They say, that in such a case, "L'emprunteur
" sera bien obligé de rendre la somme qui lui a été prêtée, mais
" il ne fera pas obligé de payer en outre la somme qu'il a promis
" de payer pour le profit maritime; car le profit maritime étant
" le prix des risques que le prêteur devoit courir des effets sur
" lesquels le prêt été fait, il ne peut lui être dû de profit mari-
" time quand il n'a couru aucuns risques, ne pouvant pas y avoir
" un prix des risques, s'il n'y a pas eu de risques."

Vide the
Appendix,
No. 2.

Beaves Lex
Merc. Red.
4th edit.
p. 127.

Bottomry bonds generally express from what time the risk shall commence, as that the ship shall sail from *London* to such a port abroad, &c. In such cases, the contingency does not commence till the departure: and therefore if the ship receive injury by storm, fire, &c. before the beginning of the voyage, the person borrowing alone runs the hazard. But if the condition be, "that if the ship shall not arrive at such a place by such a time, then," &c.; in these instances, the contract commences from the time of sailing, and a different rule, as to the loss, will necessarily prevail.

at the beginning of this chapter, that the
bottomry or respondentia, in this country,

is not restrained by any regulation whatever; although it is in many maritime states by express ordinances: that the only restriction in the law of *England* is, with respect to money lent on ships and goods going to the *East Indies*, which, by statute, must not exceed the value of the property on which the loan is made. It remains then to see what those risks are, to which the lender undertakes to expose himself. These are for the most part mentioned in the condition of the bond, and are nearly the same, against which the underwriter, in a policy of insurance, undertakes to indemnify, "*Limita hoc singulariter, ut creditor 'subeat periculum navigationis, in casibus fortuitis tantum.'*" These accidents are, tempests, pirates, fire, capture, and every other misfortune, except such as arise either from the defects of the thing itself, on which the loan is made, or from the misconduct of the borrower: for, says the *Italian* lawyer, last quoted, in continuation of the above sentence, "*Secus est si infortunium, 'vel naufragium ex culpa debitoris processerit, quia tunc creditor non tenetur de periculo, et damno, in quod incurritur ex culpa vebentis, prout in simili deciditur in materia affecurationis, ut quantumcumque affecuratio sit generalis, non contineat periculum, aut damnum, quod facto affecurati contingit.'*"

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XXI.19 Geo. 2.
c. 37. f. 5.Vide the
Appendix,
No. 2.
Roccus de
Vavibus,
Not. 51.2 Valin, 14.
Roccus, loc.
cit.

It seems to have been a doubt late in the last century, whether a loss by the attacks of pirates fell within the words, perils of the sea; for it was argued in the King's Bench, in the reign of *James* the Second. But the Court were of opinion, that piracy was one of the dangers of the seas.

Barton v.
Wolstord,
Comb. 56.

The lender is answerable likewise for losses by capture; or to speak more accurately, if a loss by capture happen, he cannot recover against the borrower; but in bottomry and respondentia bonds, capture does not mean a mere temporary taking, but it must be such a capture as to occasion a total loss. And therefore, if a ship be taken and detained for a short time, and yet arrive at the port of destination within the time limited, (if time be mentioned in the condition,) the bond is not forfeited, and the obligee may recover.

This doctrine was laid down by the w
Bench, in a case upon a bond of this na
which were fully stated, when the una

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court was delivered by Lord *Mansfield*.—"This comes before the court upon a motion, on the part of the defendant, for a new trial. It was an action of debt upon a bottomry bond; the condition of which was, that upon the ship's safe arrival at *New York*, a certain sum of money should be paid to the plaintiff; but that in case the ship should miscarry, be lost, cast away, or taken by the enemy, the plaintiff should have nothing. The defendant pleaded three pleas: 1st, *Non est factum*; 2dly, That the ship did not arrive at *New York*, the port of destination; 3dly, that the ship was captured. Upon the two first pleas issue was joined: and to the last, there was a replication of recapture. The facts, which appeared in evidence on the trial, are these: *the ship was taken before her arrival at New York*, by two *American* privateers, which detained her for one month, and plundered her of her stores; at which time *she was retaken* by an *English* privateer and carried into *Halifax*. The Admiralty Court adjudged her to be a good prize to the *English* privateer, and decreed that she should be restored to the original owners, on paying one eighth for salvage: that she proceeded with the remainder of her cargo to *New York*, and earned her freight: that the value of the ship was not sufficient to satisfy the bond. These are the facts. Now it is clear, that by the law of *England* there is neither average nor salvage upon a bottomry bond. It was indeed contended at the bar on the part of the defendant, that this case was within the saving of the bond; for it is provided, that in case of loss by capture, &c. the bond should be void: and that here there was a capture, and a detention for one month. But upon consideration, we think that a capture within this condition does not mean a temporary capture, but it must be a total loss: now here it was not such a capture as to occasion a total loss. The voyage was not lost, for the defendant pursued it and earned his freight. Freight depends upon the safety of the ship; and as the freight was earned, the ship must have arrived safe at the port of destination. In whatever way we determine this case, there must be a hardship: but we are all of opinion, that the verdict is right, and that the rule for a new trial must be discharged.

from the ~~fact~~ not only learn what shall be deemed a capturing of that word in a bottomry bond, but a piece of very essential information, namely

that a lender on bottomry, or at respondentia, is neither entitled to the benefit of salvage, nor liable to contribute in case of a general average. This was expressly said by Lord *Mansfield* in delivering the judgment of the court. His Lordship's opinion is confirmed by the statute of the 19th of *George* the Second, c. 37. which allows the benefit of salvage to lenders upon ships or goods going to the *East Indies*; clearly shewing that there was no such thing at the Common Law, otherwise there was no occasion to make such a provision.

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19 Geo. 2.
c. 37. f. 3.

In this respect our law differs from that of *France*, for the ordinances, and indeed it seems always to have been the case in that country, expressly declare, that the lenders on bottomry shall be subject to general or gross average, in the same manner as insurers are upon policies of insurance; for that as these contracts depend upon the same principles, they are subject to the same regulations.

Le Guidon,
c. 19. arr. 5.
2 Valin, 19.
2 Emer. 504.

Our law in this respect is different also from that of *Denmark*. This lately appeared in a cause tried in the King's Bench before Lord *Kenyon* at *Guildhall*.

It was an action on a policy of insurance upon a *respondentia* bond on ship and goods, at and from *B.* to *C.* The ship was *Danish*, and an average loss was sustained upon the goods to the amount of 6*l.* 15*s.* *per cent.* and the plaintiff, as holder of a *respondentia* bond, had been called upon to contribute; and now brought his action against the *English* underwriters for the amount of that contribution.

Walpole v.
Ewer, Sitt.
after Trin.
1789.

Lord *Kenyon* Chief Justice.—“By the law of *England*, a lender upon *respondentia* is not liable to average losses; but is entitled to receive the whole sum advanced, provided ship and cargo arrive at the port of destination. The plaintiff contends, that as by the law of *Denmark*, such lenders upon *respondentia* are liable to average, and bound to contribute according to the amount of their interest, the insurer must answer to them. The *Danish* Consul has proved that he received judgment of the Court of *Copenhagen*, the decretal part of which is of *Denmark* to be as the plaintiff has stated.”

C H A P. XXI. several men of eminence in that country have been offered on each side: but I reject them, because the solemn decision of a court of competent jurisdiction is of much greater weight, than the opinions of advocates, however eminent, or even than the extrajudicial opinions of the most able judges. It seems as if in this case, the underwriters were bound by the law of the country, to which the contract relates." Verdict for the plaintiff (a).

It has been said, that if the accident happen by the default of the borrower, or of the captain, the lender is not liable, and has a right to demand the payment of the bond. If, therefore, the ship be lost by a wilful deviation from the track of the voyage, the event has not happened, upon which the borrower was to be discharged from his obligation. This has been decided in several cases.

(a) This is not the only case, in which the insurers have been held liable to indemnify, the insured having been obliged by the law of a foreign country to pay a larger sum than by the laws of *England* could have been demanded: though to be sure, in the case about to be quoted, there seems to have been an usage proved; and upon that the learned judge much relied, and seems to have doubted the general rule as afterwards stated by Lord *Kenyon* in the case of *Walpole v. Ewer*.

Newman v. Cazalet, Sittings at Guildhall after Hilary. It was an action on a policy, upon a cargo of fish from *Newfoundland* to any port of *Spain, Portugal, or Italy*. The ship met with bad weather, and put into *Alicant* and *Leghorn* to repair. The captain being owner, presented a petition to the commercial court of *Pisa*, to adjust the general average, as he had put in for the general benefit of all concerned. The court, according to its usual course (which appears to be a very extraordinary one) adjusted the loss by charging the cargo at its full value, but the ship only at one half, and the freight at one third: and they also charged as a part of the general average, the seamen's wages and provisions, while in port. The defendant, as underwriter, had paid into court as much as would cover the average; if adjusted according to the memorandum in the policy, and the law and usage of *England*. The question was, Whether the plaintiff having been compelled to pay beyond that sum, according to the calculation of the sentence of the court of *Pisa*, it was conclusive upon the defendant, and the plaintiff was entitled to recover his average by the same standard. The plaintiff called several brokers, who said that in repeated instances they had adjusted averages under similar sentences of the court of *Pisa*; and the underwriters, though with reluctance, had always paid them.

Mr. Justice Buller.—"On the general law, the plaintiff would fail; but in all matters of trade, usage is a sacred thing. I do not like these foreign settlements of average, which make underwriters liable for more than the standard of *English* law. But if it has been the usage, upon the evidence given, it ought not to be rejected, and a verdict accordingly.

An action of debt was brought upon an obligation for performance of covenants in an indenture, wherein it was recited, that such a ship was in the service of the *East India Company*, and that it was to obey such orders as they or their factors should give; and that she was designed for a voyage from *London* to *Bantam*, and from thence to *China* or *Formosa*. The plaintiff lent 500*l.* upon the hull of the ship, and the defendant covenanted to pay, if the ship went from *London* to *Bantam*, and returned from thence directly to *London*, 550*l.*: if from *London* to *Bantam*, and from thence to *China* or *Formosa*, and returned to *London* within 24 months, 650*l.* If she returned not within 24 months, then to pay 5*l.* per month above 650*l.* till the 36 months: and if she returned not within 36 months, then to pay 710*l.* unless it can be proved by *Wildy*, that the ship returned not, but was lost within 36 months. The ship, in fact, went from *London* to *Bantam*, and from thence to *Surat*, and other parts, and so returned to *Bantam*: and in her voyage from *Bantam* to *London*, was lost within 36 months: upon which the present action was brought.

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Western
v. Wildy,
Skins. 152.

The court inclined to be of opinion, that the ship having deviated from the voyage described, in going to *Surat*, the plaintiff was not to bear the loss, and was consequently entitled to recover. They, however, took time to deliberate; and after consideration, gave judgment for the plaintiff.

In another case of debt upon a bottomry bond, the defendant pleaded, that the ship went from *London* to *Barbadoes*, *sine deviation*, and afterwards she returned from *Barbadoes* towards *London*, and in her return was lost in *voyagio predicto*; the plaintiff replied, that the ship in her return went from *Barbadoes* to *Jamaica*; and that after a stay there, she returned from *Jamaica* towards *London*, and was lost, and so shows a deviation. The defendant rejoined, that she was pressed into the king's service, and so was compelled to go to *Jamaica*, which is the deviation pleaded by the plaintiff; without this that she deviated after she was pressed. The plaintiff demurred, and judgment was given for the plaintiff. The plea of the defendant pleads that the ship went from *London* to *Barbadoes*, and that in the return she was lost

Williams v.
Steadman,
Holt's Rep.
126. Skins.
345. S. C.

C H A P. said: but it does not show *without deviation*. Now the condition
XXI. is so in exprefs words, and he ought to show exprefsly that he
has performed the words of the condition.

1 Eq. Cases, The same rule of decision has been adopted in the Courts of
Abr. 372.
2 Ch. Cases, Equity.
330.

The plaintiff entered into a penal bond to pay 40s. per month for 50l.: the ship was to go from *Holland to the Spanish islands, and to return to England*: but if she perished, the defendant was to lose his 50l. The ship went accordingly to the *Spanish islands*, took in *Moors at Africa*, then went to *Barbadoes*, and perished at sea. The plaintiff, being sued at law upon the bond, came into equity, suggesting that *the deviation was through necessity*. But this bill was dismissed, except as to the penalty.

C. 1. There is no restriction by the law of *England* as to the persons, to whom money may be lent on bottomry, or at respondentia (a). In a former part of this work, we gave the history of a statute introduced into our code of laws, to prevent insurances from being made on the ships or goods of *Frenchmen*, during the then existing war with *France*. The same statute also prohibited his majesty's subjects from lending money on bottomry or at respondentia on any ships or goods belonging to *France*, or to any of the *French dominions or plantations*, or the subjects thereof: and in case they should, such contracts were declared void; and the parties thereto, or the agent or broker interfering therein were to forfeit 500l. That act was not of long continuance, on account of the peace, which almost immediately followed it: and these restraints upon this species of contract were never again revived by any subsequent positive law (b).

21 G. 2.
c. 4.

Lex Merc.
Red. 4th ed.
p. 128.

It frequently happened, as appears by the preamble to the following statute, that the borrowers on bottomry or at respondentia, became bankrupts after the loan of the money, and before the

(a) See one exception as to loans on the ships of foreigners trading to the *East Indies*,

event happened, which entitled the lender to repayment : by which means the debt could not be proved under the commission, and the lenders were left to such redress as they could obtain from the bankrupt, who had previously given up every thing to his other creditors. This being likely to prove a discouragement to trade, parliament was obliged to interpose ; and it accordingly enacted, “ That the obligee in any bottomry or respondentia bond, made and entered into upon a good and valuable consideration, *bonâ fide*, should be admitted to claim, and after the contingency should have happened, to prove his or her debt or demands in respect of such bond, in like manner as if the contingency had happened before the time of the issuing of the commission of bankruptcy against such obligor, and should be entitled unto, and should have and receive a proportionable part, share, and dividend of such bankrupt’s estate, in proportion to the other creditors of such bankrupt, in like manner as if such contingency had happened before such commission issued : and that all and every person or persons, against whom any commission of bankruptcy should be awarded, should be discharged of and from the debt or debts owing by him, her, or them, on every such bond as aforesaid, and should have the benefit of the several statutes now in force against bankrupts, in like manner, to all intents and purposes, as if such contingency had happened, and the money due in respect thereof had become payable before the time of the issuing of such commission.”

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19 Geo. 2.
c. 32. s. 2.

By the statute book it appears, that the masters and mariners of ships having taken upon bottomry greater sums of money than the value of their adventure, had been accustomed wilfully to cast away, burn, or otherwise destroy the ships under their charge, to the great loss of the merchants and owners : it was therefore enacted, “ That if any captain, master, mariner, or other officer belonging to any ship, should wilfully cast away, burn, or otherwise destroy the ship unto which he belonged, or procure the same to be done, he should suffer death as a felon.” The duration of this act having been limited to three years, it became extinct : but the necessity of it was so great, that a similar law was made a second time, and is still in force.

16 Ch. 2.
c. 6. s. 12.

CHAP.
XXI.

Vide ante,
c. 1.
3 Burr.
1394.

As the commerce of the country increased to an amazing degree, so the custom of lending money on bottomry became also very prevalent: and as the lenders had subjected themselves to great risks, they began to think it necessary to protect their property, by insuring to the amount of the money lent. In a former chapter, much was said of the mode by which insurances on such property were to be effected; and we then saw from the case of *Glover v. Black*, that it was necessary to insert in the policy that the interest insured was bottomry or respondentia, and that such was the law and practice of merchants. From this case too it is evident, that when a person has insured a bottomry or respondentia interest, and he recovers upon the bond, he cannot also recover upon the policy: because he has not sustained a loss within the meaning of his contract; and to suffer any man to receive a double satisfaction, would be contrary to the first principles of insurance law. As it is merely a contract of indemnity, a man shall never receive less; nor can he be entitled to recover more than the amount of the damage he has, in fact, sustained.

CHAPTER THE TWENTY-SECOND.

Of Insurance upon Lives.

AN Insurance upon Life is a contract, by which the under-
writer for a certain sum, proportioned to the age, health,
profession, and other circumstances of that person, whose life
is the object of insurance, engages that the person shall not die
within the time limited in the policy : or if he do, that he will
pay a sum of money to him in whose favour the policy was
granted. Thus if *A.* lend 100*l.* to *B.* who can give nothing
but his personal security for repayment : in order to secure him,
in case of his death, *B.* applies to *C.* an insurer, to insure his
life in favour of *A.* by which means, if *B.* die within the time
limited in the policy, *A.* will have a demand upon *C.* for the
amount of his insurance.

C H A P.
XXII.

1 Postlethw.
Dict of Tr.
p. 150.
Vide the
Appendix,
No. 3.
2 Blac. Com
459-

The advantages resulting from such insurances are many and
obvious : and most of them may be reduced under the following
classes. To persons possessed of places or employments for life ;
to masters of families, and others, whose income is subject to
be determined, or lessened, at their respective deaths ; who, by
insuring their lives, may secure a sum of money for the use of
their families. To married persons, where a jointure, pension,
or annuity, depends on both or either of their lives, by insuring
the life of the persons entitled to such annuity, pension, or joint-
ture. To dependents upon any other person, during whose life
they are entitled to a salary or benefaction, and whose life being
insured, will enable such dependents, at the death of their be-
nefactor, to claim from the insurers a sum equal to the premium
paid. To persons wanting to borrow money, who, by insuring
their lives, are enabled to give a security for money bor-
rowed. These, and many other advantages, have been observed
the Bishop of *Oxford*, Sir *Thomas Allen*, and
men, were induced to apply to Queen *Ann*
for incorporating them and their successors.

1 Postlethw.
150.

C H A P. might provide for their families, in an easy and beneficial manner. Accordingly, in the year 1706, her majesty granted her
 XXII. royal charter, incorporating them by the name of "The Amicable Society for a perpetual Assurance Office," giving them a power to purchase lands, an ability to sue and be sued in their corporate capacity, and a common seal for the more easy and expeditious management of the affairs of the Company.

The benefits, which accrued to the public from this species of contract, were found to be so extensive, that another office was established by deed enrolled in the Court of King's Bench at *Westminster*, for the insurance of lives only. The name of this office is the "*society for equitable assurance on lives and survivorships*." Besides this, the two Companies of the *Royal Exchange* and *London Assurance*, obtained his majesty's charter, to enable them also to make insurance on lives. The charter points out the advantages of such institutions; for it states as the ground, on which such a permission is to be granted, "That it has been found by experience to be of benefit and advantage, for persons having offices, employments, estates, or other incomes, determinable on the life or lives of themselves or others, to make assurances on the life or lives, upon which such offices, employments, estates, or incomes are determinable (a)." Private underwriters also may enter into policies of this nature, as well as any other, provided the party, making the insurance, chuses to trust their single security.

(a) An act passed in the 39 Geo. 3. (ch. 33.) for incorporating a new insurance company, called *The Globe Insurance Company*; the second section of which authorizes them (among other things) to make insurances on the life or lives of any person or persons whomsoever; and to grant, purchase, and sell annuities for lives, or on survivorship, and grant sums of money, payable at future periods, within the kingdom of *Great Britain* or *Ireland*, and any other parts abroad, whether within his Majesty's dominions or not; and shall and may receive deposits of funds of *contingent societies*, and other institutions established for granting future advantages, and deposits of funds belonging to, and act as treasurers thereof for benefit or friendly societies, and other charitable and benevolent institutions; and make provision for the widows and children of the clergy, and for clergymen, and to receive deposits from or on account of members of the industrious classes, and to make provision for members of the industrious classes of the same, and to allow interest on such deposits made, or otherwise, upon and in such manner, as shall or may be agreed upon between the same, and established, and the persons and societies treated as the persons thereinbefore mentioned.

The antiquity of this practice cannot be very easily ascertained; however, we find traces of it in some very old authors. In the *French* book, entitled *Le Guidon*, we find it mentioned, as a contract perfectly well-known, at that time, in other countries. The author of that book, however, tells us in the same passage, that it was a species of contract wholly forbidden in *France*, as being repugnant to good morals, and as opening a door to a variety of frauds and abuses. Such, indeed, the law of *France* continues at this day: and insurances upon lives are prohibited in other countries of *Europe* by positive regulation. The same *French* author has, however, gone a little too far in asserting, that the other countries, in which they had been till that time encouraged, were also obliged to forbid them. This had not certainly taken place at that time, as may be inferred from the 66th article of the laws of *Wijbuy*: and in *England* they never had been prohibited. The learned *Roccus*, also takes notice of them as legal contracts, and quotes various authors in support of his opinion.

C H A P.
XXII.

Le Guidon,
c. 16 art. 5.
published in
1661.

2 Valin, 54.
2 Mag. 70.

Le Guid.
loc. cit.

Roccus de
Affec. Not.
74.

These insurances being thus sanctioned in *England* by royal authority, and the funds of the different societies having very much increased, and being fixed on a stable and permanent foundation, contracts of this nature became so much a mode of gambling (for people took the liberty of insuring any one's life, without hesitation, whether connected with him, or not, and the insurers seldom asked any question about the reasons, for which such insurances were made) that it at last became a subject of parliamentary discussion. The result of that discussion was, that a statute passed, by which it was enacted, "That no insurance should be made by any person or persons, bodies politick or corporate, on the life or lives of any person or persons, or on any other event or events whatsoever, wherein the person or persons, for whose use, benefit, or on whose account, such policies should be made, should have no interest or by way of gaming or wagering: and every insurance made, contrary to the true intent and meaning thereof, should be null and void to all intents and purposes." And in order more effectually to guard against any imposition, fraud, or to be the better able to ascertain, what the person entitled to the benefit of the insurance, really was, he enacted, by the same statute, "that

1 Mag. 33.

14 Geo. 3.
c. 48. s. 1.

- C. H. A. P. "to make any policy or policies on the life or lives of any per-
 XXII. son or persons, or other event or events, without inserting in
 "such policy or policies, the person's name interested therein,
 "or for whose use, benefit, or on whose account, such policy
 Sect. 3. "was so made or underwrote. And that in all cases where the
 "insured had an interest in such life or lives, event or events,
 "no greater sum should be recovered, or received from the in-
 "surer or insurers, than the amount or value of the interest of
 "the insured in such life or lives, or other event or events.
 Sect. 4. "That nothing in the act contained shall extend, or be con-
 "strued to extend, to insurances *bonâ fide* made by any person
 "or persons, on ships, goods, or merchandizes; but every such
 "insurance shall be as valid and effectual in law, as if this act
 "had not been made."

It has been held that a person, holding a note given for money won at play, has not an insurable interest in the life of the maker of the note.

Dwyer v.
 Edie, Lond.
 51 times af-
 f. r. Hil.
 1788.

An action was brought on a policy on the life of *James Russell* from the 1st of *June* 1784 to the 1st of *June* 1785. *Russell* was warranted in good health, and by a memorandum at the foot of the policy it was declared that it was intended to cover the sum of 500*l.* due from *Russell* to the plaintiff, for which he had given his note payable in one year from the 14th of *May* 1784.—Two objections were made on the part of the defendant: 1st, That part of the consideration for the note was money won at play: 2dly, That *Russell* at the time he gave the note was an infant.

Mr. Justice *Buller* nonsuited the plaintiff upon the ground of part of the consideration of the note being for a gaming transaction; and therefore there was a want of interest in the plaintiff. But as to the other objection on account of infancy the interest must be contingent, for *Russell* might or might not avoid his note; and he doubted much whether till so avoided, the note must not be taken against a third person to be the note of an adult, for the maker of the note only could take the ob-

But

Merton, in which a policy made, in order to
 was held to fall within the prohibition

But a creditor has such an interest in the life of his debtor, that he may insure it, and recover upon the policy.—Thus in an action on a policy of insurance on the life of Lord *Newhaven* from the 1st of *December* 1792 to the 1st of *December* 1793, the only question made by the defendant was as to the plaintiff's interest, which it was contended was not sufficient to take this case out of the statute 14 *Geo.* 3. c. 48. It appeared in evidence that Lord *Newhaven* was indebted to the plaintiff and a Mr. *Mitchell* in a large sum of money, part of which debt had been assigned by them to another person; the remainder, being more than the amount of the sum insured, was upon a settlement of accounts between the plaintiff and *Mitchell*, agreed by them to remain to the account of *Mitchell* only.

C H A P.
XXII.

Anderson
Edie, B. R.
Lord, Sitt.
in Trinity
Term, 1795.

Lord *Kenyon* was of opinion, that this debt was a sufficient interest: and said, that it was singular, that this question had never been *directly* decided before. That a creditor had certainly an interest in the life of his debtor; the means by which he was to be satisfied may materially depend upon it, and at all events the death must in all cases in some degree lessen the security. Verdict for the plaintiff.

So also in a previous case, where an action was brought on a policy on the life of *William Holden* from the 17th *August* 1790 to *August* 1791, and during the life of the plaintiff; *Holden* had granted an annuity to the plaintiff's late brother, which annuity he had bequeathed to persons not parties to this insurance, having made the plaintiff executor of his will, and directed him to make assurance. Lord *Kenyon* thought this a sufficient interest in the executor to support the action. The cause proceeded, therefore: but the defendant had a verdict afterwards upon a different ground.

Edie, B. R.
Lord, Sitt.
in Trinity
Term, 1795.

statute. In another case, a policy having been made, on the event of there being an open trade between *Great Britain* and the province of *Maryland*, on or before the 1st of *July* 1778, Lord *Mansfield* said, that it was clear the plaintiff could not recover. 1st, Is this an interest within the act? It was made to prevent gambling policies. Every man in the kingdom has an interest in the events of war and peace. 2dly, The policy has an interest within the act. But, 3dly, The policy name inserted according to the second section of the statute.

C H A P. But if after the death of the debtor, his executors pay the
XXII. debt, the creditor cannot afterwards recover upon the policy, although the debtor died insolvent, and the executors were furnished with the means of payment from another quarter than the estate of their testator.

Godfoll &
others v.
Baldere &
others,
9 East, 72.

This point was decided in an action brought by Messrs. Godfoll, coachmakers, against the directors of the Pelican Life Insurance Company, on a policy on the life of the late Right Honourable *Wm. Pitt*; and the declaration averred that the plaintiffs were interested in his life at the time of making the insurance, and till the time of his death to the amount of the sum insured. One of the pleas, and the material one stated, that the debt due to the plaintiffs was *after the death of Mr. Pitt, and before the exhibiting of the plaintiffs' bill*, fully paid to the plaintiffs by the Earl of Chatham and the Lord Bishop of Lincoln, executors of the will of Mr. Pitt. Issue was taken on the fact of payment by the executors. Upon the trial of this cause before Lord Ellenborough a case was reserved for the opinion of the Court, stating that Mr. Pitt died on the 23d January 1806; that the defendants were served before Trinity Term with process issued on the 3d June 1806: that Mr. Pitt, at the time of the execution of the policy, was indebted to the plaintiffs, and continued so till his death in upwards of 500*l.* the sum insured, and died insolvent. That on the 6th March 1806, the executors of Mr. Pitt paid to the plaintiffs, out of the money granted by parliament for the payment of Mr. Pitt's debts, 1100*l.* as in full for the debt due to them from Mr. Pitt. After argument at the bar, and time taken to deliberate, the judgment of the Court was pronounced by

Lord Ellenborough.—“ This was an action of debt on a policy of insurance on the life of the late Mr. Pitt, effected by the plaintiffs, who were creditors of Mr. Pitt for the sum of 500*l.* The defendants were directors of the Pelican Life Insurance Company, with whom that insurance was effected. (His Lordship, after stating the pleadings and the case, proceeded.)—This insurance is other to which the law gives effect, (with the obtained in the 2d and 3d sections of the stat. as in its nature a contract of indemnity, as

distinguished from a contract by way of *gaming* or *wagering*. CHAP. XXII.
 The interest, which the plaintiffs had in the life of Mr. Pitt, was that of creditors, and the probability of loss which resulted from his death. The event, against which the indemnity was sought by this assurance, was substantially the expected consequence of his death, as affecting the interest of these individuals assured in the loss of their debt. This action is in point of law founded on a supposed damnification of the plaintiff, occasioned by his death, existing, and continuing to exist at the time of the action brought: and being so founded, it follows of course, that if, before the action was brought, the damage, which was at first supposed likely to result to the creditors from the death of Mr. Pitt, were wholly obviated and prevented by the payment of his debt to them, the foundation of any action on their part, on the ground of such insurance, fails. And it is no objection to this answer, that the fund out of which their debt was paid did not (as was the case in the present instance,) originally belong to the executors, as the part of assets of the deceased: for though it were derived *aliunde* the debt of the testator was equally satisfied by them thereout; and the damnification of the creditors, in respect of which their action upon the assurance contract is alone maintainable, was fully obviated before their action was brought. This is agreeable to the doctrine of Lord Mansfield in *Hamilton v. Mendes*, 2 Burr. 1210. The words of Lord Mansfield are, "The plaintiff's demand is for an indemnity: his action then must be founded upon the nature of the damnification, as it really is at the time the action is brought. It is repugnant, upon a contract for indemnity, to recover as for a total loss, when the event has decided that the damnification in truth is an average, or perhaps no loss at all. Whatever undoes the damnification in the whole, or in part, must operate upon the indemnity in the same degree. It is a contradiction in terms to bring an action for indemnity where, upon the whole event, no damage has been sustained." Upon this ground, therefore, that the plaintiffs had in this case no subsisting cause of action in point of law, in respect of their contract, regarding it as a contract of indemnity, at the time of the action brought, we are of opinion that a verdict must be entered for the defendants on the first and third issues, standing the finding in favour of the plaintiff.

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very few and short: because those general rules and maxims, upon which so much has been said with regard to insurances in general, are also applicable to this species of them: the same mode of construction is to be adopted: fraud will equally affect the one as the other; the same attention must be paid to a rigid compliance with warranties; and the same rules of proceeding are to be followed.

Aveson v.
Lord Kin-
nard.
6 East. 188.

It lately became a question, in an action by a husband on a policy on the life of his wife, whether the declarations of the wife as to her state of health, then lying in bed apparently ill, describing the bad state she was in, at her going to M. (whither she went to be examined by the surgeon preparatory to the insurance being made) down to that time, and her fear that she could not live 10 days longer when the policy would be returned, were admissible in evidence. It was held they were.

Vide the
Appendix,
No. 3.

With respect to the risk, which the underwriter is to run, this is usually inserted in the policy; and he undertakes to answer for all those accidents to which the life of man is exposed unless the *cestuy que vie* put himself to death, or he die by the hand of justice. The policy, as to the risk, generally runs in these words: "The said insurers, in consideration of the sum paid, do assure, assume, and promise, that the said A. B. shall, by the permission of Almighty God, live and continue in this natural life for and during the said term, or in case he the said A. B. shall, during the said time, or before the full end and expiration thereof, happen to die by any ways or means whatsoever, suicide or the hands of justice excepted, then," &c. We see, that this contract expressly says, the death must happen within the time limited, otherwise the insurers are discharged. But suppose a *mortal wound* is received during the existence of the policy, and the person languishes till after the term limited in the contract, what says the law? Agreeably to the decision of this point, in cases of marine insurances, not only the cause of the loss, but the loss itself, must actually happen ~~at the~~ ^{within} the time named in the policy, otherwise the insurers are discharged. This very case was put by Mr. Justice Gummant, when delivering the opinion of the

Vide ante,
2. p. 41.

court, in the case of *Lockyer v. Offley*. Suppose, said the learned judge, an insurance upon a man's life for a year, and some short time before the expiration of the term, he receive a mortal wound, of which he dies after the year, the insurer would not be liable.

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Vide ante,
p. 43.

But when an insurance is made upon a man's life, who goes to sea, and the ship in which he sailed was never afterwards heard of, the question, whether he did or did not die within the term insured, is a fact for the jury to ascertain from the circumstances which shall be produced in evidence.

Thus in an action on a policy of insurance on the life of *L. Maclean* Esq. from the 30th of *January* 1772 to the 30th of *January* 1778, it appeared in evidence that about the 28th of *November* 1777, *Maclean* sailed from the *Cape of Good Hope*, in the *Swallow* sloop of war, which ship, not being afterwards heard of, was supposed to have been lost in a storm off the *Western Islands*. The question was, Whether *Maclean* died before the 30th of *January* 1778? In order to establish the affirmative of that question, the plaintiff called witnesses to prove the ship's departure from the *Cape* with *Maclean*; and several captains swore that they sailed the same day; that the *Swallow* must have been as forward in her course as they were on the 13th or 14th of *January*, the period of a most violent storm, in which she probably was lost. That the *Swallow* was much smaller than their vessels, which, with difficulty, weathered the storm.

Patterson v.
Black. Str.
at *Guildhall*,
Hil. Vac.
1780.

Lord *Mansfield* left it to the jury, whether, under all the circumstances, they thought the evidence sufficient to convince them that *Maclean* died before the expiration of the time limited in the policy; adding, that if they thought it so doubtful as not to be able to form an opinion, the defendant ought to have their verdict. The jury found for the plaintiff.

These insurances, when a loss happens upon paid according to the tenor of the agreement, insured, as this sort of policy, from the nature of life or death of man, does not admit of the distinction and partial losses,

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Vide ch. 21.
and ch. 14.

29 Geo. 2.
c. 37. s. 2.

We have seen that private persons, as well as the public companies, may be underwriters upon policies on lives; and as they frequently became bankrupts after the policy was underwritten, but before a loss happened, it became a question, Whether the persons interested in such insurances could claim the money, and prove the debt, under the commission, as if the loss had happened before it issued. In the chapter immediately preceding this, and in one prior to that, we took occasion to observe, that in order to remedy an inconvenience of this nature with respect to marine insurances and bottomry bonds, a statute had passed allowing creditors, either on such policies, or bottomry and respondentia bonds, to prove their debts under the commission, as if the loss or contingency had happened prior to that event. But as the words of the preamble to that section of the statute were special, referring only to insurances on ships, and goods, or contracts of bottomry, it was doubtful whether it extended to insurances on lives, although the words of the enacting part were very general, namely, "the assured in *any policy of insurance*," &c. In support of this doubt it was urged, that great inconveniences would follow from extending the statute to such policies, because the risk may remain undetermined for a long and indefinite number of years. The court, however, held, that the general words of the enacting part were to be controlled by the preamble.

Cox v. Liotard, B. R. Hil. 24. G. 3. Dougl. Rep. p. 166. note.

This doctrine was laid down in an action on a policy of insurance on the life of *J. H. Boyd*, lately granted to the *T. F. Lohs*, on the event of his dying between the 5th of April 1781, and the 5th of April 1783. The defendant pleaded; 1st, Bankruptcy generally; and that the cause of action accrued before the bankruptcy: 2dly, That the policy was made prior to the time of his becoming a bankrupt, then the trading, petitioning creditor's debt, commission, proceedings, and certificate were specially set out, and that he was thereby discharged from the said policy, and all debts due at the time of the bankruptcy, without saying, that the cause of action accrued before the bankruptcy. To this there was a general demurrer.

1.—"The only question is, whether the enacting part of the statute, which are *general*, shall be restrained by the preamble, which is *particular*. I think they should not be. The enacting clause comprehends *all* insurances."

and consequently insurances *upon lives*. This is exactly the case of *Pattison v. Banks* (a); for there the preamble was *particular*, but the enacting clause was *general*. C H A P.
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Mr. Justice *Willes* and Mr. Justice *Ajbburst* concurred.

Mr. Justice *Buller*.—"In the case of *Mace v. Cadell*, it was held, that the enacting words of the statute of the 21st of *Ja. 1. c. 19.* were not restrained by the preamble (b). The inconveniences that have been urged, are not so great as are apprehended; for the creditors need not be delayed in their dividend. When a creditor has an insurance of this kind, he has nothing to do but lay to it before the commissioners, who will make a calculation, and lay aside as much as will give him a dividend equal to that of the other creditors. There must be judgment for the

It became a doubt in the reign of King *William*, when a policy on a life was to run from the day of the date thereof, till that day twelvemonth, and the person died on the day named, whether the insurer was liable. The court held that he was. The case was this: A policy of insurance was made to insure the life of Sir *Robert Howard* for one year, from the day of the date thereof; the policy was dated on the 3d day of *September* 1697. Sir *Robert* died on the 3d of *September* 1698, about one

Sir Robert
Howard's
case, 2 Salk.
625. 1 Ld.
Raymond,
480. S. C.

(a) The question in *Pattison v. Banks*, (*Cowp. Rep.* 540.) arose upon the 7 *Geo. 1. c. 21.* which allowed persons, who had given credit on bills, bonds, notes, and other securities, payable at a future day, and which were not payable at the bankruptcy of the debtor, to prove them under the commission. The preamble to the statute speaks of securities only for the sale of goods and merchandizes; but as the enacting words were general, the court held, that they extended to a bond for the payment of an annuity for a term of years.

(b) The statute of *James* enacts, "that if any person, at such time as he shall become bankrupt, shall, by the consent of the true owner, &c. have in his possession, &c. any goods, &c. whereof he shall be reputed owner; the commissioners shall have power to sell the same in like manner as any other part of the bankrupt's estate." The preamble says, "whereas it often happens that many persons before they become bankrupts, do convey their goods to other men, upon good consideration, and yet retain the possession, and are reputed owners thereof," &c. The case of *Mace v. Cadell* (*Cowp.* 232.), held, that the statute extended to the goods which he allowed the bankrupt to keep possession of, as well as to the goods which he allowed the bankrupt to keep possession of, although the statute speaks only of

Mace v.
Cadell, which

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o'clock in the morning. Lord *Holt* held that from the day of the date excludes the day, but from the date includes it (a); so that the day of the date must be excluded here, and the underwriter is liable.

Vide the
Appendix,
No. 1.

Although from a perusal of the note below, it will appear that no difficulty could occur on such a point at the present day; yet it is usual, in order to prevent disputes, to insert in the modern policies "*the first and last days included.*"

Vide ante,
284.

Policies on lives are equally vitiated by fraud or falsehood, as those on marine insurances; because they are equally contracts of good faith, in which the underwriter, from necessity, must rely upon the integrity of the insured for the statement of circumstances. Indeed, the case of *Wittingham v. Thornborough*, which we took the occasion to cite in support of the doctrine laid down in the chapter upon fraud in Marine insurances, was a policy upon a life insurance.—In another case, the principles of fraud were considered as far as it affects this contract.

Stackpole v.
Simon, Sitt.
at Guildhall,
Hilary Vac.
1779.

It was an action on a policy of insurance for 150*l.* at four guineas *per cent.* in case *Drury Sheppey* should die at any time between the 1st of *April* 1777 and the 1st of *April* 1778, both days included, and during the life-time of *John Sheppey*, the father of *Drury*: but in case the said *John* should die before the said *Drury*, the policy to be void; the question was, as to the representation of the life at the time of the insurance. The interest in the insurance was 900*l.* due from *Drury Sheppey* to the plaintiff. It was admitted, that the life expired within the time limited in the policy. *Drury Sheppey* had a place in the Custom-house of *Ireland*, and was in bad circumstances. He went to

(a) In the law books, not perhaps much to the honour of the profession, this distinction taken by Lord *Holt* was at one time held to be law, at others not: sometimes, these expressions were held to mean the same thing; at others to be quite different. In the year 1777, however, this glaring absurdity was entirely done away, and the Court of King's Bench unanimously held, after much deliberation, that they mean the same thing. They shall either be exclusive or inclusive, according to the context. They shall be so construed as most effectually to support the deeds of the party them. See Lord *Mansfield's* very elaborate argument upon all the cases are fully stated and considered. *Pugh v. The Duke of* 1714.

the South of *France* for the benefit of his health, or to avoid his creditors, and there died. The broker, who effected the policy, told the underwriters that the gentleman, for whom he acted, would not warrant, but from the account he (the broker) had received, *he believed it to be a good life.*

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Lord *Mansfield*.—"As to the interest, this policy may be considered as a collateral security for the debt due to the plaintiff. Where there is no warranty, the underwriter runs the risk of its being a good life or not. If there be a concealment of the knowledge of the state of the life, it is a fraud. It is a rule that every subsequent underwriter gives credit to the representation made to the first; and it is allowed that any subsequent underwriter may give in evidence a misrepresentation to the first. The broker here does not pretend to any knowledge of his own, but speaks from *information*. There is no fraud in him." There was a verdict for the plaintiff.

Even where there is an express warranty, that the person is in good health, it is sufficient that he is in a reasonable good state of health; for it never can mean, that the *cestui que vie* is perfectly free from the seeds of disorder. Nay, even if the person, whose life was insured, laboured under a particular infirmity, if it can be proved by medical men, that it did not at all, in their judgment, contribute to his death, the warranty of health has been fully complied with; and the insurer is liable.

Thus in an action on a policy made on the life of Sir *James Ross* for one year, from *October 1759* to *October 1760*, warranted in good health at the time of making the policy: the fact was, that Sir *James* had received a wound at the battle of *La Feldt* in the year 1747, in his loins, which had occasioned a partial relaxation or palsy, so that he could not retain his urine or *feces*, and which was not mentioned to the insurer. Sir *James* died of a malignant fever within the time of the insurance. All the physicians and surgeons, who were examined for the purpose, that the wound had no sort of connection with the want of retention was not a disorder, & life, but he might, notwithstanding that, have lived.

Ross v. Bradshaw,
1 Blac. Rep.
p. 312.

C H A P. XII. mon age of man : and the surgeons who opened him, said, that his intestines were all found. There was one physician examined for the defendant, who said, the want of retention was paralytick ; but being asked to explain, he said, it was only a local palsy, arising from the wound, but did not affect life : but on the whole he did not look upon him as a good life.

Lord *Mansfield*.—" The question of fraud cannot exist in this case. When a man makes insurance upon a life generally, without any representation of the state of the life insured, the insurer takes all the risk, unless there was some fraud in the person insuring, either by his suppressing some circumstances, which he knew, or by alleging what was false. But if the person insuring knew no more than the insurer, the latter takes the risk. In this case there is a warranty, and wherever that is the case, it must at all events be proved, that the party was a good life, which makes the question on a warranty much larger than that on fraud. Here it is proved that there was no representation at all, as to the state of life, nor any question asked about it : nor was it necessary. Where an insurance is upon a representation, every material circumstance should be mentioned, such as age, way of life, &c. But where there is a warranty, then nothing need be told ; but it must in general be proved, if litigated, *that the life was, in fact, a good one, and so it may be, though he have a particular infirmity.* The only question is, *Whether he was in a reasonable good state of health, and such a life as ought to be insured on common terms ?* The jury, upon this direction, without going out of court, found a verdict for the plaintiff.

Willis v. Poole, Sitt. at Guildhall, Easter Vac. 1780.

In a subsequent case, the same rule of decision was recommended and enforced. It was an action on a policy on the life of *Sir Simeon Stuart Bart.* from the 1st of *April 1779* to the 1st of *April 1780*, and during the life of *Eliza Edgely Ewer*. This policy contained a warranty that *Sir Simeon* was about 57 years of age, and in good health on the 11th of *May 1779*, and that Mrs. *Ewer* was about 78 years of age. The defendant at the trial shewed that *Sir Simeon* and Mrs. *Ewer* were of the respective ages mentioned in the warranty ; that he died before the 1st of *April 1780*, and that she was living. Two questions were

intended to have been made; 1st, As to the plaintiff's interest: 2d, On the warranty of health. The former was disposed of by the plaintiff having proved a judgment debt. As to the latter, it appeared in evidence, that, although Sir *Simeon* was troubled with spasms and cramps from violent fits of the gout, he was in as good health, when the policy was underwritten, as he had been for a long time before. It was also proved by the broker, who effected the policy, that the underwriters were told, that Sir *Simeon* was subject to the gout. Dr. *Heberden* and other gentlemen of the faculty were examined, who proved that spasms and convulsions were symptoms incident to the gout.

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Lord *Mansfield*.—"The imperfection of language is such that we have not words for every different idea; and the real intention of parties must be found out by the subject matter. By the present policy, the life is warranted, to some of the underwriters *in health*, to others *in good health*; and yet there was no difference intended in point of fact. *Such a warranty can never mean that a man has not the seeds of a disorder.* We are all born with the seeds of mortality in us. A man, subject to the gout, is a life capable of being insured, if he has no sickness at the time to make it an unequal contract." "There was a verdict for the plaintiff."

In a former chapter we saw, that when the risk is entire, and it is once begun, there shall be no apportionment or return of premium, though it should cease the very next day after it commenced. The same rule is applicable in every respect to the premium on life insurances; for the contract is entire, and if the person whose life is insured should put an end to it the next day after the risk commences, though the underwriter is discharged, there would be no return of premium. This has never been decided in any judicial determination expressly on the point, but it has frequently been declared to be the law upon the subject by the learned judges in the course of argument, when return of premium on marine insurances was the point under discussion. This was particularly done in the case of *Robt. v. The London Assurance Co.*, by Lord *Mansfield*, when delivering the judgment in the court. "There has been an instance put," said
 "of a policy where the measure is by time, which

Vide ante,
c. 19.

C H A P. “ to be very strong and apposite to the present case ; and that is
 XXII. “ an insurance upon a man’s life for twelve months. There
 “ can be no doubt but the risk there is constituted by the mea-
 “ sure of time, and depends entirely upon it : for the under-
 “ writer would demand double the premium for *two* years, that
 “ he would take to insure the same life for one year only. In
 “ such policies, there is a general exception against suicide. If
 “ the person puts an end to his own life the next day, or a month
 “ after, or at any other period within the twelve months, there
 “ never was an idea in any man’s breast, that part of the pre-
 “ mium should be returned.”

Doug. 789. Afterwards in the case of *Bermon v. Woodbridge*, Lord *Man-
 field* laid down the same doctrine. “ In an insurance upon a
 “ life, with the common exception of suicide, and the hands of
 “ justice, if the party is executed, or commit suicide, in twenty-
 “ four hours, there shall be no return.”

From these opinions, which have been frequently repeated in
 other cases, the law upon the subject of return of premium, as
 applicable to life insurances, seems perfectly ascertained: because,
 except in the case of suicide or a public execution, the question
 can never arise.

CHAPTER THE TWENTY-THIRD.

Of Insurance against Fire.

AN insurance of this sort is a contract, by which the insurer, C H A P.
XIII. in consideration of the premium which he receives, undertakes to indemnify the insured, against all losses, which he may sustain in his house, or goods, by means of fire, within the time limited in the policy. To enter upon a detail of the various advantages, which mankind have derived from this species of contract, would be a waste of time; because they are obvious to every understanding. As little does it fall within the compass of my plan to enumerate the various offices that have been instituted for the purpose of insuring property against fire; or the rules and regulations, by which they are severally governed. Some of them have been instituted by royal charter; others by deed, enrolled; and others give security upon land for the payment of losses. The rules, by which these societies are governed, are established by their own managers, and a copy given to every person at the time he insures; so that, by his acquiescence, he submits to their proposals, and is fully apprized of those rules upon the compliance or non-compliance with which he will or will not be entitled to an indemnity.

See 1 H.
Blackst.
254.

The construction to be put upon those regulations has but seldom become the subject of judicial enquiry; few instances only having occurred in our researches upon this occasion. In the proposals of the *London Assurance Company*, and some of the other offices, there is a clause by which it is provided, that they do not hold themselves liable for any loss or damage by fire, happening by any invasion, foreign enemy, or any military or usurped power whatsoever. It became a question, what species of insurrection should be deemed a military or usurped power within the meaning of this proviso. It was held by a part of Common Pleas against the opinion of Mr. Justice, that it could only mean to extend to houses set on fire by invasion from abroad, or of an internal rebellion, where troops are employed to support it.

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Drinkwater
v. the Cor-
poration of
the London
Assurance,
a Will. 363.

The case in which this question arose, was an action of covenant against the defendants upon a policy of insurance of a malting office of the plaintiff at *Norwich* from fire, in which policy there was a proviso that the corporation should not be liable in case the same shall be burnt by any invasion by foreign enemies, or any military or usurped power whatsoever, and that the defendants had not kept their covenants, to the plaintiff's damage. The defendants plead first the general issue, that they have not broke their covenants, and thereupon issue is joined. 2dly, They plead that it was burnt by an *usurped power*; the plaintiff replies, that it was not burnt by an *usurped power*, and thereupon issue is also joined. This cause was tried at *Norwich* assizes; a verdict was given for the plaintiff, and 469*l.* damages, subject to the opinion of the court, upon the following case, viz. That upon *Saturday* the 27th of *November*, a mob arose at *Norwich* upon account of the high price of provisions, and spoiled and destroyed divers quantities of flour; thereupon the proclamation was read, and the mob dispersed for that time. Afterwards another mob arose, and burnt down the malting office in the policy mentioned. The question is, Whether the plaintiff is entitled to recover in this action? This case was twice argued at the bar, and the court took time to deliberate; after which, as the judges differed in opinion, they delivered their opinions *seriatim*.

Mr. Justice *Gould* was of opinion, that the malting office being burnt by the mob, who rose to reduce the price of provisions, the same was burnt by an *usurped power*, within the true intent and meaning of the proviso in the policy: to shew that it was an usurped power for any person to assemble themselves, to alter the laws, to set a price upon victuals, &c. he cited *Popham*, 122. where it is agreed by the justices, that to attempt such a thing by force is felony, if not treason; and therefore judgment ought to be for the defendant.

Mr. Justice *Bathurst*.—"The words, "*usurped power*," in the proviso, according to the true import thereof, and the meaning of the words, can only mean an invasion of the kingdom by foreigners to give laws and usurp the government thereof, or armed force in rebellion, assuming the power of making laws, and punishing, for not obeying. The plea alleges that the malting office was burnt

by an *usurped power* unlawfully exercised, but does not charge *that* usurped power as a rebellion; that a mob arose at *Norwich* on account of the price of victuals, and as soon as the proclamation was read, they dispersed; therefore judgment ought to be for the plaintiff."

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Mr. Justice *Clive*.—"The words must mean such an usurped power as amounts to high treason, which is settled by the 25th of *Edward Third*. The offence of the mob in the present case was a felonious riot, for which the offenders might have suffered; but it cannot be said to be an usurped power; therefore I am of opinion that judgment should be given for the plaintiff."

Lord Chief Justice *Wilmot*.—"Upon the best consideration I am able to give this case, I am of opinion, that the burning of the malting office, was not a burning by an *usurped power* within the meaning of the proviso. Policies of insurance, like all other contracts, must be construed according to the true intention of the parties. Although the counsel on one side said, that policies ought to be construed liberally; on the other side, that they ought to be construed strictly; in a doubtful case I think the turn of the scale ought to be given against the speaker, because he has not fully and clearly explained himself. The imperfection of language to express our ideas is the occasion that words have equivocal meanings; and it is often very uncertain what the parties to a contract in writing mean. When the ideas are simple, words express them clearly; but when they are complex, difficulties often arise: and men differ much about the ideas intended to be conveyed by words: In the present case, what is the true idea conveyed to the mind by the words *usurped power*? The rule to find it out is to consider the words of the context, and to attend to the popular use of the words, according to *Horace*, *Arbitrium est, et jus, et norma loquendi*. My idea of the words, *burnt by an usurped power*, from the context is, that they mean burnt or set on fire by occasion of an invasion from abroad, or of an internal rebellion, when armies are employed to support it, when the laws are dormant, and firing of towns are unavoidable; these are the picture drawn by the idea, which these words present to the mind. The time of the incorporation of this so

C H A P. XXIII. *don Assurance Company*, was soon after a rebellion in this kingdom, and it was not so romantic a thing to guard against fire by rebellion, as it might be now ; the time, therefore, is an argument with me that this is the meaning of these words. Rebellious mobs may be also meant to be guarded against by the proviso, because this corporation commenced soon after the riot act ; and if common mobs had been in their minds, they would have made use of the word *mob*. The words "*usurped power*," may have a great variety of meanings according to the subject matter where they are used, and it would be pedantic to define the words in their various meanings ; but in the present case, they cannot mean the power used by a common mob. It has not been said, that if one, or fifty persons had wickedly set this house on fire, that it would be within the meaning of the words *usurped power*. It has been objected that here was an *usurped power* to reduce the price of victuals, but this is part of the power of the crown ; and therefore it was an *usurped power* : but the king has no power to reduce the price of victuals. The difference between a rebellious mob, and a common mob, is, that the first is high treason ; the latter a riot or a felony. Whether was this a common or a rebellious mob ? The first time the mob rises, the magistrates read the proclamation, and the mob disperses ; they hear the law, and immediately obey it. The next day another mob rises on the same account, and damages the houses of two bakers ; thirty people in fifteen minutes put this army to flight, they were dispersed and heard of no more. Where are the *species belli* which Lord Hale describes ? This mob wants an universality of purpose to destroy, to make it a rebellious mob, or high treason. 1 Hale's P. C. 135. There must be an universality, a purpose to destroy *all* houses, *all* inclosures, *all* bawdy houses, &c. Here they fell upon two bakers and a miller, and the mob chastized these particular persons to abate the price of provisions in a particular place : this does not amount to a rebellious mob. When the laws are executed with spirit, mobs are easily quelled ; sometimes a courageous act done by a single person will quell and disperse a mob. And sometimes the wisdom of an individual will do the same, as is thus beautifully described by Virgil,



*agno in populo cum saepe coorta est
itque animis ignobile vulgus,*

*Tamque faces et saxa volant : furor armæ ministrat.
Tum pietate gravem, ac meritis, si forte virum quem
Conspexere, silent, arreclisq; auribus adstant :
Ille regit dictis animos, et pectora mulcet.*

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But amongst armies, the laws are silenced, and the wisdom or courage of an individual will signify nothing. Upon the whole, I am of opinion, that there must be judgment for the plaintiff:" and accordingly the *poslea* was ordered to be delivered to the plaintiff, by three judges against one.

The Sun Fire Office has used words of a larger and more extensive import than those, which were the subject of discussion in the last case; for the proprietors of that company declare, that they will not pay any loss or damage by fire, happening by any invasion, foreign enemy, *civil commotion*, or any military or usurped power whatsoever. A case has unfortunately arisen, in which the meaning of these words, *civil commotion*, has been the subject of judicial enquiry.

An action was brought on a policy of insurance to recover from the Sun Fire Office a satisfaction for damage done to the plaintiff's houses and goods by the rioters, who, it is very well known, and history will inform posterity, in *June 1780*, to the terror and dismay of the inhabitants of *London*, traversed that city for several days burning and destroying *Roman Catholic* chapels, public prisons, and the houses of various individuals; the ostensible purpose of their assembling being to procure the repeal of a wise and humane law, (which had passed for some indulgencies to *Roman Catholics*;) and who were at last only dispersed by military force. As the circumstances of these riots were very recent, they were not minutely gone into at the trial. It was, however, sufficiently proved, that the plaintiff, on account of his religion, (being a *Roman Catholic*), had been, amongst others, selected as an object of the rage of the times, and that his houses and effects were set on fire. The office defended this action, considering that they were protected by the article just recited, namely, "That they would not answer for any loss, occasioned by an invasion, foreign enemy, *civil commotion*, or any military or usurped power whatsoever." This point was argued much at length by the counsel

Langdale v.
Mason and
others, Sitt.
at Guild-
hall, Mich.
Vac. 1780.

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Vide *supra*.

Lord *Mansfield*.—"Gentlemen of the jury, this is an action brought by the plaintiff against the defendants upon the policy of insurance mentioned in the pleadings, for the value of property, which was consumed by fire. Most undoubtedly, every man's leaning must be to the side of the plaintiff, in order to divide the loss in so great a calamity. But that leaning must be governed by rules of law and justice: and the only question that arises for your determination and that of the court, is singly upon the construction of two words in the policy. It will be necessary, in order to investigate this matter, to go into the history, which has been opened and explained to you, of other insurance policies. In the year 1720, the *London Assurance Company* put into their policies all the words here used, except *civil commotion*. Whatever fire happens by a foreign enemy is clearly provided against: when they burn houses, or set fire to a town, that is also provided for. What is meant by military or usurped power? They are ambiguous; and they seem to have been the subject of a question and determination. They must mean rebellion, where the fire is made by authority: as in the year 1745, the rebels came to *Derby*, and if they had ordered any part of the town, or a single house to be set on fire, that would have been by authority of a rebellion. That is the only distinction in the case—it must be by rebellion got to such a head, as to be under authority. In the year 1726, some years after the *London Assurance Company* had done it, the *Sun Fire office* put in the exception; and in 1727, they put in other words: they do not keep to the form of the *London Assurance*: they do not say by invasion from foreign enemies merely: they clearly provide against rebellion, determined rebellion, with generals who could give orders. Though this be so guarded, the *Sun Fire Office* did not think it answered their purpose; and therefore they took the words *civil commotion*. Not only using those words, applicable to guard against a foreign enemy, against a rebellion, where there are officers and leaders, that can give authority and power; but they add other words, as general and untechnical as can possibly be used; *civil commotion*, not civil commotion that amounts to *high treason*. They avoid saying civil commotions that amount to felony: they avoid saying civil commotions that amount to *misdeemeanors*: but they use a general expression "if the mischief *arises* from a civil commotion," taking the largest and use of the words that the language will allow: they

do not even say a *riot*. It may be a question in point of law, C H A P.
XXIII. whether an assembly or multitude be a riot. In that case, they do not say committing a felony, but speak of fire occasioned by civil commotion. The single question is, Whether this has been a civil commotion? If there be a case to which these words can be applicable, it is to a case of this sort. I cannot see any of the other words, to which it can be applied. Usurped power takes in rebellion, acting by usurped powers amongst themselves. From a foreign enemy the office is secured. But what is a civil commotion? It is something else. The present was an insurrection of the people resisting all law, setting the protection of the government at nought, taking from every man, who was the object of their resentment, that protection, as appears from the evidence given by the witnesses upon the facts, and which you all know as well as if no witnesses had been produced. What was the object and end of this violent insurrection? It took place in many parts of the town at the same time, and the very same night; the mob were in *Broad street*, *St. Catharine's*, in *Colman-street*, at *Blackfriar's Bridge*, and at the plaintiffs. What is the object? *General destruction, general confusion. It certainly was meant to aim at the very vitals of the constitution.* It was not a private matter, under the colour of *popery* only, to destroy all Papists under a pretence or a cry of *No popery*. But the general object was *destruction* and *confusion*. The Fleet Prison was burnt down: Newgate was burnt down the night before. The King's Bench Prison is burnt, and all the prisoners set at liberty. The new Bridewell is burnt: the Bank attacked: consider the consequences, if they had succeeded in destroying the Bank of *England*. The Excise and Pay Offices in *Broad street* were threatened. Military resistance, and an extraordinary stretch were made and justified by necessity. There was a great deal of firing, many men were killed; and the houses of a vast number of Papists were burnt and destroyed. What is this but a *civil commotion*? No definition has been attempted to be given of what it is. It is said, that this is a civil commotion distinct from usurped power and rebellion. It is admitted that this kind of insurrection may amount to high treason: and, to be sure, it may. But the office do not put their expectations upon trying, whether they were guilty of high treason or not. There is no manner of doubt, that this was an insurrection for a grand purpose, to take from a set of men the p

E H A P. law. That is levying war against the king ; there is not any
XXIII. doubt of it. It is not put upon that, but on the ground of a civil
 commotion. It is not an occasional riot, that would be another
 question. I do not give any opinion what that might be. You
 will give your opinions, whether the facts of this case bring it
 within the idea of a civil commotion. I think a civil commo-
 tion is this ; an insurrection of the people for general purposes,
 though it may not amount to a rebellion, where there is an
 usurped power. If you think it was such an insurrection of the
 people for the purposes of general mischief, though not amount-
 ing to a rebellion, but within the exception of the policy, you
 will find for the defendants. If not, you will find for the plain-
 tiff." The jury, agreeably to the Chief Justice's direction,
 found for the defendants." (a).

See the
 printed pro-
 posals of the
 different
 Fire Offices.

When a fire happens, and the party sustains a loss in conse-
 quence of it, he is bound by the printed proposals of most of the
 societies, to give immediate notice thereof to the office in which
 he is insured ; and as soon as possible afterwards, or within a li-

Tarleton
 and others v.
 Stainforth,
 5 Term.
 Rep. 695.
 This judg-
 ment was
 afterwards
 affirmed in
 the Ex-
 chequer-
 chamber,
 3 Bos. &
 Pull. 471.

(a) In a policy of insurance against loss by fire from half a year to half a year, the insured agreed to pay the premium half-yearly "as long as the assurers should agree to accept the same, within 15 days after the expiration of the former half year ;" and it was also stipulated that no insurance should take place till the premium was actually paid ; a loss happened within 15 days after the end of one half year, but before the premium for the next was paid ; and it was held that the assurers were not liable, though the as-
 su ed tendered the premium before the end of the 15 days, but after the loss.

The defendants in the above cause were members of a society at Liverpool, for the insurance of property from fire ; but soon after the decision, the Royal Exchange Assu-
 rance Company, the Phoenix, and some other Insurance Companies, gave notice that they did not mean to take advantage of the judgment so pronounced, but would hold themselves liable for any loss during the 15 days that were allowed for the payment of the insurance upon annual policies, and all other policies of a longer period. But that po-
 licies for a shorter period than a year would cease at six o'clock in the evening of the day mentioned in the policy. Still, in a subsequent case against the Sun Fire Office, which had advertized, the Court held, notwithstanding this advertisement, the assured having had notice, before the expiration of the year, to pay an increased premium for the year ensuing, otherwise they would not continue the insurance, which the assured refused, that the office was not liable for a loss which had happened within 15 days from the expiration of the year, for which the insurance had been made, though the assured, after the loss and before the 15 days expired, tendered the full premium, which had been demanded, the court being of opinion that the effect of the whole contract was only to give the assured an option to continue the assurance or not during 15 days after the expiration of the year, by paying the premium for the year ensuing, notwith-
 standing the advertisement, by giving notice that they would not renew the contract upon

mitted time according to the regulations of some, to deliver in as particular an account of his loss, or damage, as the nature of the case will admit; and make proof of the same, by his oath or affirmation, by books of accounts, or such other vouchers as shall be required, or as shall be in existence. It is also necessary that the insured should procure a certificate under the hands of the ministers and churchwardens, together with some other reputable inhabitants of the parish, not concerned in such loss, importing, that they are well acquainted with the character and circumstances of the sufferer or sufferers; and do know, or verily believe, that he, she, or they, have really, and by misfortune sustained by such fire the loss and damage therein mentioned (a). When any loss is settled and adjusted, the sufferers are to receive immediate satisfaction, without any deduction.

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In the *Lex Mercatoria* it is said, that policies on houses and lives admit of no *average*. That this is true of the latter cannot be denied, as we have already shewn in the preceding chapter; because the payment of the whole sum depends upon one single event, which must *wholly* happen, or not at all. But that it cannot be true of insurances against fire either of houses or goods is equally clear; for houses may be *partially* damaged, and goods may be *par.ially* destroyed. In which case, as insurance is a contract of indemnity, the end of the contract is answered by putting the party in the same situation in which he was before the accident happened. But if he were to recover the whole sum insured, he would be in a better situation, which the law will not allow. Indeed, from the above quotation from the printed proposals it is evident, that the offices consider themselves liable for partial losses. Nay, some of them, if not all, expressly undertake to allow all reasonable charges, attending the removal of goods, in cases of fire, and to pay the sufferer's loss, whether the goods are destroyed, lost, or damaged by such removal.

Beawes, 4th
edit. p. 294.

Royal Ex-
change Af-
surance
Company,
Sun Fire
Office,
Phoenix
Fire Office,
&c.

These policies of insurance are not in their nature assignable, for they are only contracts to make good the loss which the

Worsley v.
Wood,
6 Term
Rep. 701.
2 H. Black.
574. S. 1.
See also
Rouldge v.
Burrell, 1 H.
Black. 254.

(a) Since the three first editions of this work were published, it has been held by the Court of King's Bench, upon a writ of error from the Court of Common Pleas, that the printed proposals, containing the above clause, are to be considered as part of the policy: and that the procuring such a certificate is a condition precedent to the right of the assured to recover, and cannot be dispensed with, even though the churchwardens wrongfully refuse to grant the certificate.

C H A P. contracting party himself shall sustain; nor can the interest in
 XXIII. them be transferred from one person to another without the consent of the office (a). There is a case in which, by the proposals, these policies are allowed to be transferred, and that is, when any person dies, the policy and interest therein shall continue to the heir, executor, or administrator, respectively, to whom the property insured shall belong; provided, before any new payment be made, such heir, executor, or administrator, do procure his or her right, to be indorsed on the policy at the said office, or the premium be paid in the name of the said heir, executor, or administrator. But in all other cases, there can be no assignment; and the party claiming an indemnity must have an interest in the thing insured at the time of the loss. These points were decided in two causes, one before Lord Chancellor *King*, and the other before Lord *Hardwicke*.

Lynch and
 another v.
 Dalzell and
 others,
 3 Brown's
 Parl. Cases,
 497.

On the 28th of *July 1721*, one *Richard Ireland* took out from the *Sun Fire Office*, a policy of insurance, whereby it was witnessed, that whereas the said *Ireland* had agreed to pay, or cause to be paid to the said office, the sum of five shillings within fifteen days after every quarter-day, for the insurance of his house, being the *Angel Inn* at *Gravefend*, with his goods and merchandize as therein after expressed only, and not elsewhere, viz. the dwelling-house, not exceeding 400*l.* and for the goods in the same only, not exceeding 500*l.*; and for the stable only, not exceeding 100*l.* all then occupied by *James Peck*, from loss and damage by fire; and so long as the said *Richard Ireland* should duly pay or cause to be paid five shillings a quarter, as therein mentioned, the said society did bind themselves, their heirs, executors, administrators and assigns, to pay and satisfy the said *Ireland*, his executors, administrators, and assigns, within fifteen days after every quarter-day, in which he should suffer by fire, his loss not exceeding 1000*l.* according to the exact tenor of their printed proposals. The policy was subscribed the 28th of *July 1721*, by three of the trustees of the society. Some considerable time afterwards, *Richard Ireland* died, having made his will, and *Anthony* his son sole executor; who brought the policy to the office, and had an indorsement made thereon, that the same then belonged to him: and afterwards,

in such insurances, the policy may be transferred. *Delaney v. Stoddart*,

namely,

namely, at or about *Christmas* 1726, he, the said *Anthony*, paid the office a premium of twenty shillings for one year's insurance, from *Christmas* 1726, to *Christmas* 1727, as by an article in the proposals, he was at liberty to do. On the 24th of *August* 1727, a fire happened at *Gravefend*, which, among others, destroyed the house mentioned in the policy; and some time afterwards the appellants applied to the office, and alleged, that they had purchased the house and goods of *Anthony Ireland*; that the same were their property at the time of the fire, and that they had an assignment of the policy made to them, at the same time that the house and goods were assigned; and they produced an affidavit made by the appellant *Roger Lynch*, in which he swore, that his loss and damage by burning the said house, amounted, at a moderate computation, to 500*l.* and upwards; and upon this affidavit was indorsed a certificate of the minister, churchwardens, and other inhabitants of *Gravefend*, that they verily believed, according to the best of their information, the appellants had sustained a loss of 500*l.* and upwards. But neither in the affidavit or certificate, was any mention made of any loss being sustained by the appellants by the burning of any goods in the said house; nor was any affidavit made by *Anthony Ireland*, in whom the property of the policy was, that he had suffered any loss. The appellants, however, insisted that the office should pay them 1000*l.* for their loss sustained by the burning of the house and goods; and they accordingly filed a bill in Chancery, setting forth, that *Anthony Ireland* agreed to sell and assign to the appellants the house, stables, and goods, and also, at the same time agreed to assign the policy; and that by indenture of the 24th of *June* 1727, for 250*l.* *Ireland* did assign to the appellants a lease he had of the house and stables for the residue of a term of 70 years, which commenced at *Midsummer*, 16 *Car.* 2.; but the goods, for which the appellants, as they alleged, were to pay 500*l.* being intended for one *Thomas Church*, who was to hold the inn under the appellants, *Ireland*, by deed poll of the same date, sold the same to *Church* for his own use. The bill also stated, that by another writing of equal date, *Ireland* assigned the policy, and all money and benefit thereof, to the appellants. That although the bill of sale of the household goods was made to *Church*, yet, as the appellants paid the purchase-money for the same, *Church* assigned his bill of sale to them,

C H A P. money they had paid for the goods; and afterwards, by another
XXIII. writing, released to the appellants his benefit and interest in the policy. The bill prayed satisfaction.

The respondents put in their answer, in which they set forth the nature and method of the insurances made by the office, and admitted the policy in question, and the appellants' application for 1000*l.* loss: but said, that the affidavit produced was not agreeable to the proposals; and that they had been informed and believed, that no assignment of the policy was made to the appellants, nor any assignment of goods made to them by *Church*, till after the fire. They insisted, that the policies, issued by the office, were not, in their nature, assignable, the same being only contracts to make good the loss which the contracting party himself should sustain: and the policy in question was first made to *Richard Ireland*, to pay his loss, and was afterwards declared by indorsement to belong to *Anthony Ireland*; and that no other person was entitled to the benefit of it. The cause proceeded to issue, and witnesses were examined on both sides; and upon the appellants' own evidence it appeared, that the first discourse between the appellants and Mr. *Ireland* about the policy was after the execution of the assignment of the house, and that the agreement (if there was any) about the policy was not at the time when the appellants agreed to purchase *Ireland's* term in the house. It appeared further, that the assignment of the policy, though bearing date *before*, was not made and executed till some time *after* the fire; so that the agreement for assigning the policy was a voluntary concession of *Ireland* without any consideration, and independent of the bargain for the house, and never made till after *Ireland's* interest in the policy, as to the house, was determined, by his selling his interest in the thing insured, and not carried into execution till the thing was lost. As to the appellants' property in the goods, they proved an assignment from *Church* to them, as a security for 300*l.* but omitted, in their interrogatories, the material question, *when this assignment was made*: though the respondents, by their answer, put the time plainly in issue, by insisting, that it was after the fire; and it did not appear that the appellants ever had any property in the goods. The respondents on their part proved, that the office did not insure any persons longer than they continued their pro-

perty in the thing insured ; and that persons dealing with them might not be mistaken, such notice was usually given.

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Lord Chancellor *King*.—"These policies are not insurances of the specific things mentioned to be insured ; nor do such insurances attach on the realty, or in any manner go with the same as incident thereto, by any conveyance or assignment ; but they are only special agreements with the persons insuring, against such loss or damage as they may sustain. The party insuring must have a property at the time of the loss, or he can sustain no loss ; and consequently can be entitled to no satisfaction. There was no contract ever made between the office and the appellants for any insurance on the premises in question. Not only the express words, but the end and design of the contract with *Ireland* do, in case of any loss, limit and restrain the satisfaction to such loss as should be sustained by *Richard Ireland* only ; and the indorsement on the policy declared that right to his executor *Anthony Ireland* only. These policies are not in their nature assignable ; nor is the interest in them ever intended to be transferable from one to another, without the express consent of the office. The transactions in the present case, by changing their property backwards and forwards, and rendering it uncertain whose the true property is, raise a suspicion, and fully justify the caution of the office, in preventing the assignment without consent of the managers, which method is pursued by all the insurance offices. Besides, the appellants' claim is at best founded only on an assignment never agreed for till the person insured had determined his interest in the policy, by parting with his whole property, and never executed till the loss had actually happened." His lordship therefore dismissed the bill.

Upon this decree there was an appeal to the House of Lords ; and after hearing counsel on both sides, it was ORDERED AND ADJUDGED, that the same should be dismissed, and the decree therein complained of affirmed.

A few years afterwards this case was cited with approbation by Lord *Hardwick*, and relied upon by him as the ground of his opinion.

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The Sadlers'
Company v.
Baccock
and others
2 Atk. 554

Anne Strode, having six years and a half to come in a lease of a house from the plaintiffs, on the 27th of *April* 1734, became a proprietor of the Hand-in-hand Office, by insuring the sum of 400*l.* on the house, for seven years; and on paying twelve shillings down, and three pounds some time after, the Company agreed, "to raise and pay, out of the effects of the contribution stock, the said sum of 400*l.* to her, and her executors, administrators, and assigns, so often as the house shall be burnt down within the said term, unless the directors should build the said house, and put it in as good plight as before the fire; and on the back of the policy it was indorsed, that if this policy should be assigned, the assignment must be entered within twenty-one days after the making thereof." Mrs. *Strode's* lease expired at *Midsummer* 1740, the house was not burnt down till the *January* after 1740, and she made an assignment of the policy to the plaintiffs the 23d of *February* after 1740. The question is, Whether the plaintiffs, the assignees of Mrs. *Strode*, are entitled to the 400*l.* or to have the house built again; or whether the house being burnt down after Mrs. *Strode's* property ceased in it, the Company are obliged to make good the loss to her assignee of the policy? The Company made an order, subsequent in time to Mrs. *Strode's* policy in 1738. "That, whereas policies expire upon the property of the insured's ceasing, if there is no application of the insured to assign, or to have the loss made up, then the person having the property may insure the said house in the said office, notwithstanding the term for which the house was originally insured is expired." There was evidence read for the plaintiffs to shew that they tendered the assignment to the defendants, to enter in their books, but they refused to accept of it.

Lord Chancellor *Hardwicke*.—"During the progress of this cause, while the defendants seemed to depend chiefly upon the subsequent order, I was of opinion against them. But, upon hearing what was further offered, I think the plaintiffs are not entitled to be relieved. There may be three questions made in this cause. First, Whether this accident, which has happened, is such a loss, as obliges the defendants to make satisfaction to

is rather consequential of the former, Whether the plaintiffs are properly assignees of Mrs. *Strode* under this policy? If this matter rested singly upon the policy itself, I should not think it such a loss, as would oblige the defendants to make satisfaction. Under this policy, the state of the case is, Mrs. *Strode* was only a lessee, her time expired at *Midsummer* 1740, the house was burnt down in *January* after, *within the seven years*; the plaintiffs, the *Sadlers' Company*, were ground landlords, and entitled to the reversion of the term: upon the 23d of *February*, seven months after the expiration of the term, and one month after the fire, the assignment was made, and in consideration of five shillings only; so that it must be taken as a voluntary assignment, as it stands before me. It has been insisted, on the part of the defendants, that the plaintiffs are not entitled to recover, as standing in the place of Mrs. *Strode*, because she had no loss or damage, her interest ceasing before the fire happened. And this introduces the second and third questions. I am of opinion, it is necessary the party insured should have an interest or property at the time of insuring, and at the time the fire happens. It has been said for the plaintiffs, that it is in nature of a wager laid by the insurance company, and that it does not signify to whom they pay, if lost. Now these insurances from fire have been introduced in later times, and therefore differ from insurance of ships, because there *interest or no interest* is almost constantly inserted, and if not inserted (a) you cannot recover, unless you prove a property. By the first clause in the deed of contribution in 1696, the year this society, called the *Hand-in-Hand Office*, incorporated themselves, the society are to make satisfaction in case of any loss by fire. To whom, or for what loss, are they to make satisfaction? Why, to the person insured, and for the loss he may have sustained; for it cannot properly be called insuring the thing, for there is no possibility of doing it, and therefore must mean insuring the person from damage. By the terms of the policy, the defendants might begin to build and repair within six days after the fire happens. It has been truly said, this gives the society an option to pay or rebuild, and shows most manifestly they meant to insure upon the property of the insured, because nobody else can give them

(a) This case was decided in the year 1743,
20 Clow & Co. 57.

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even a brick; for another person might fancy a house of a different kind. Thus it stands upon the original agreement. The next question will be, whether the subsequent order, made by the defendants in 1738, has made any alteration. I am of opinion it has not, for it was made only to explain a particular case in the policy: for it might have been a question, whether Mrs. *Strode* could have come, before the expiration of the term, to examine the books of the office, and therefore this order was made to give her such a power. It has been strongly objected that the society could not make such an order. I am very tender of saying, whether they can or not. Because, on one hand, it might be hard to say, that as a society they cannot make any order for the good of the society: on the other hand, it would be a dangerous thing to give them a power to make an alteration, that may materially vary the interest of the insured. The assignment is not at all within the terms of this order, because it is plain, it meant an assignment before the loss happened. Now with regard to the loss happening before the assignment made, Mrs. *Strode* was entitled to nothing but what was to be paid back upon the deposit. It is plain she thought so, for if she had imagined she had been entitled to 400*l.* would any friend have advised her to make a present of it to the plaintiff? The case of *Lynch v. Dalzell*, in the House of Lords, shews how strict this court and that House are, in the construction of policies, to avoid frauds." The bill here must be dismissed.

Vide supra.

In the body of the policy, the company acknowledge the receipt of the premium at the time of making the insurance: and by the printed proposals of the different societies, it is expressly stipulated, that no insurance shall take place, till the premium be actually paid by the insured, his, her, or their agent or agents. This premium or consideration money is in all the offices at the rate of two shillings *per cent.* for any sum not exceeding 1000*l.* and two shillings and sixpence from 1000*l.* upwards. But this must be understood to mean the premium upon common insurances only: for upon hazardous trades, and wooden buildings, &c. the premium is proportioned to the risk. Besides this, by a late act of parliament, a duty of one shilling and sixpence *per annum* on every hundred pounds of property insured from fire. ~~made void by~~ an additional duty of sixpence, for

In the whole two shillings *per cent.* The duty imposed by the first act is not to extend to publick hospitals.

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We have formerly seen, that whenever the risk to be run was entire, there never was a return of premium, though the contract should cease and determine the next day after its commencement. This rule applies to insurances against fire, which generally are made for one entire and connected portion of time, which cannot be severed: and therefore if the property insured should be destroyed by fire, arising from the act of a foreign enemy, the very day after the commencement of the policy though the underwriter would be discharged, yet there can be no apportionment or return of premium.

Ante, c. 1.

By a statute passed in the reign of his present Majesty, the stamp duties on policies for insuring houses, furniture, goods, wares and merchandizes, or other property from loss by fire, are repealed; and instead thereof it is provided, that for every policy of assurance from loss by fire, where the sum insured shall not amount to 1000*l.* the sum of three shillings; and where the sum insured shall amount to 1000*l.* or upwards, the sum of six shillings shall be paid.

37 Geo. 3.

c. 90. s. 23.

Sect. 24.

As the purest equity and good faith are essentially requisite, as has been already shewn, to render the contract effectual when it relates to marine insurances; so it need hardly be observed, that it is no less essential to the validity of the policy against fire: because in the latter, as well as in the former, the insurer, from the nature of the thing, is obliged, in a great measure, to rely upon the integrity and honesty of the insured, as to the representation of the value and quantity of the property, which is the object of the insurance.

Vide ante,

c. 9.

A D D E N D A.

The following Case may properly be introduced after the Cases on Insurances on Freight, p. 46. *et seq.*

Forbes and
another v.
Cowie,
Sittings af-
ter Mich.
T. 1808.

INSURANCE on the ship *Chiswick* " at and from any port or " ports in *Hayti* to *Liverpool*, or the vessel's port or ports of " discharge in the United Kingdom, with leave to chase, &c." The insurance was declared to be " on freight valued at " and the loss was stated to be by perils of the sea. The following facts were admitted: That the plaintiffs being owners of the *Chiswick* in the declaration mentioned, procured a licence for her to sail from *Liverpool* to *St. Domingo* to trade there and to bring home a return cargo of the produce of that country.

That the *Chiswick* sailed from *Liverpool* to *St. Domingo*, called *Hayti*, and arrived at *St. Domingo* on the 4th of *July* 1808, with a cargo of goods belonging to the plaintiffs, to be there bartered for other goods to be brought back to *Liverpool* in the said ship.

That part of the goods carried from *Liverpool* were bartered and exchanged for 55 bales of cotton of the produce of *St. Domingo*, which were put on board the ship for her voyage home.

The remaining part of her outward cargo being still on board would, in all probability, in a few days have been exchanged for other goods to be put on board in like manner, but for the loss hereinafter-mentioned.

The ship with such remaining part of her outward cargo, and the said 55 bales of cotton on board being in good safety at *St. Domingo* on the 15th day of *July* 1808, was by the perils of the sea lost. The defendant has settled with the plaintiffs for the loss of the said 55 bales of cotton, without

The remaining part of the outward cargo, though damaged, was saved, and in 12 days after the loss of the ship was exchanged for 250 tons of coffee and 100 tons of wood, the produce of *St. Domingo*, the freight of which would have been of a larger value than the sum insured on freight if the ship had not been lost.

The plaintiffs were interested in the said freight in the declaration mentioned.

This action is brought to recover a total loss on the freight home.

This case was at the bar compared to the case of *Horncastle v. Stuart*, (*ante*, p. 48.) but

Lord *Ellenborough* was clearly of opinion that as there was no charterparty, nor the policy valued, this case was exactly like that of *Tonge v. Watts*, (*ante*, p. 46.) and the plaintiffs were nonsuited.

In the following term a motion was made to set aside this nonsuit, but even a rule to shew cause was refused by the whole Court.

The two following Cases may properly be adverted to after the Case of *Noble v. Kennoway*, *ante*, p. 58.

THIS was an action on a policy of insurance on fish, to commence from the loading thereof on board the ship *Dutchess of Gordon*, at and from *Newfoundland* to a port in *Portugal*, warranted to depart with a *Portugal* convoy. In one count the loss was averred to be by capture, in another by perils of the sea. The ship proceeded from *Lisbon* to *Newfoundland*, where she arrived in *July*, and then proceeded on an intermediate voyage to *Sidney* in *Nova Scotia*, in *August*, and returned with a cargo of coals on the 30th *September*. That about the 1st *October* the *Caster* frigate sailed with the convoy from *Newfoundland* for *Portugal*; but there she was captured, and the cargo was taken for the use of the enemy.

Ougier v. Jennings,
Sitt. in C.
P. after
Eas. 1800.

ADDENDA.

the ship sailed perfectly seaworthy on the 21st November for *Oporto*; was captured, recaptured, and afterwards totally wrecked. It was proved that the vessel was not by means of the intermediate voyage in any respect rendered less capable of performing her voyage to *Portugal*; and that she had not taken in any of her homeward cargo of fish before her return from the intermediate voyage. Several witnesses conversant with the *Newfoundland* trade swore to the constant usage of ships taking these intermediate trips while their cargoes are getting ready, and that these voyages are absolutely necessary to be taken for the support of the colony; that there is a great supply of coals from *Sidney*, and of bread and flour from *Quebec*, to which latter place several ships went that season.

Lord Eldon, then Chief Justice of the Court of Common Pleas, told the jury, that he thought the practice of the trade in this case was as fitly to be received in evidence as in other cases in which such proof had been admitted. Then his Lordship quoted the case of *Noble v. Kennoway*, (*ante*, p. 59.) and said, no doubt the policy here is meant to protect the first cargo which shall be laden after the ship's arrival; but the underwriter must refer himself to the usage of the trade; he is bound to know it. Is there such a usage here? If, indeed, the evidence were to lead to this, that the ship may make intermediate voyages for several years, that would be too dangerous to give effect to such a usage. But if a trader *bonâ fide* sends the ships in their turn on an intermediate voyage, that seems reasonable: *studiously sending them out of turn* would be a deviation. The next question then is, whether this ship has been employed otherwise than as the usage warrants. If you think the usage does exist; if you think it reasonable; and if you think this ship acted *bonâ fide* in taking the intermediate voyage, you will find for the plaintiff, which they did accordingly.

So in a subsequent case on an insurance, dated 26th August 1807, on ship *Courier*, freight and cargo, at and from any port or ports in *Newfoundland* to one port of discharge in *Portugal*, or to any port or ports in the United Kingdom. The facts admitted were, that the goods were loaded at *Cape Beale* in *New-
October* and the 14th December
ions from the convoy,
and

and sailed for *Dartmouth*, and was afterwards totally lost in a gale of wind. That a policy of insurance on the ship *Courier* had been underwritten on the 29th *June* 1807; and that at the time the defendant underwrote the policy in question, he was not informed by the broker, or by any other person that the *Courier* was intended to be employed in banking on the coast of *Newfoundland*, subsequent to the date of the policy in question; or that the said policy of the 29th *June* 1807, had been previously effected on the said ship to cover her banking voyage to the 31st *October* 1807; and that the said ship *Courier* was employed banking, from whence she returned to *Cape Broyle* on 13th *October* 1807. The plaintiff, in order to prove that it was not necessary to communicate this banking voyage, called several witnesses to prove the general usage that *Newfoundland* ships almost always engaged either in banking or in intermediate voyages till the fish was ready,

Lord *Ellenborough* said,—“The assured are certainly bound to communicate what the underwriters do not know; and what the assured do, but what is common between them both, need not. The question then is, whether the banking voyage is usually interposed, because if so, the fact need not be divulged. If these separate voyages and insurances are notorious in the trade, then the common words “*at and from*” must mean “*at the place when preparing for the voyage home, and then from.*” If there are exceptions to this general usage, the underwriter ought to have asked, whether in this case the exception existed.” Verdict for the plaintiff.

The two following Cases will tend to illustrate the doctrine contained in the case of *Airey v. Blandin* Ante, p. 34.

THE first of them was an action of assumpsit for money had and received. The principal item in dispute between the parties was a sum paid by the plaintiff to the defendant under the following circumstances:

Edgar
Bumstead.
J Campbell
411.

The plaintiff being an insurance broker, got a policy underwritten for the defendant, a merchant, on the ship *Alfred*, which was subscribed (among others) by one *Lomas*. A loss happened; whereupon the plaintiff paid the full amount of the sum insured to the defendant. Previously to this, *Lomas* had become insolvent, without the plaintiff being aware of the fact; and it was now contended, that he had a right to recover the sum he had paid to the defendant in respect of *Lomas's* subscription, as money paid under a mistake of the fact. But Lord *Elenborough* held, that on account of the well known course of dealing between the insurance broker, the merchant and the underwriter, the money could not, under these circumstances, be recovered back from the assured.

*De'vill v.
Mair.
2 Campbell
532.*

It has also lately been decided, that in an action by the assured against an underwriter to recover the premium, the policy subscribed by the defendant is conclusive evidence that he has received the premium. This was held in an action for money had and received, tried at *Guildhall*. The defendant had underwritten a policy of insurance effected by one *Reid*, an insurance broker, on account of the plaintiff, upon goods by ship or ships, at and from *Berbice* to *Great Britain*. This action was brought to recover back the premium, on the ground that the goods had never been shipped.

The plaintiff gave in evidence the policy signed by the defendant, which contained the usual acknowledgment on the part of the underwriters, "*confessing ourselves paid the consideration due unto us for this assurance by the assured,*" &c. It appeared, however, that no money had really been paid in respect of the insurance in question. The plaintiff being the holder of a bill of exchange accepted by *Reid*, which was not paid when due, the latter proposed by way of satisfaction to get policies of insurance underwritten for him. This policy was effected in consequence; and *Reid* having a running account with the defendant, had not paid him any part of the premium at the commencement of this action.

ADDENDA.

either from the plaintiff or *Reid*, or paid by the plaintiff either to *Reid* or the defendant.

Lord Ellenborough.—The defendant is bound by the receipt in the policy. If a man acknowledges that he has received a sum of money from the broker, and accredits him with his principal to that amount, he shall not afterwards, as between himself and the principal, be allowed to say that the broker never paid him. I should completely knock up the insurance business, if I were to allow this acknowledgment to be impeached. It is well known that there are running accounts kept between the insurance broker and the underwriter; and *Lord Kenyon* held that the former, before paying premiums to the latter, might maintain an action against the assured to recover the amount of them as for money paid.

Mr. Campbell adds in a note upon the last case, that he had not been able to find any decision of *Lord Kenyon's* upon this point: but that learned Reporter refers to the case of *Airey v. Bland*, and then adds a very acute and sensible observation, "that the object of the formal acknowledgment of the receipt of the premium inserted in the policy is probably to preclude the necessity of proving it when a loss happens, and to prevent the underwriters from objecting, that there was a want of consideration for their promise, in case the broker has not paid them. The receipt is no bar to an action for the premium by the underwriter against the broker; and the distinction seems to be this, that as between these parties it is no evidence at all, but that as between the underwriters and the assured it is conclusive. It follows as a consequence from this decision, that an action cannot be maintained for premiums of insurance by the underwriters against the assured, which has hitherto been *vexata questio*." p. 534.

The three following Cases are of importance to shew that an American subject shall not claim from an *English* underwriter any indemnity from the *English* government for loss by his own government.

not, as I conceive, alter the principle contended for in Chapter the Fourth, upon the doctrine of Abandonment. For although the words of the policy are general, "all restraints and detrainments of all kings, princes, and people, &c." yet they must ever be considered with reference to the benefit of the state in which the contracting party lives, and to the policy which it may think proper to adopt. I have not thought it necessary to state the facts of each case; because one judgment was pronounced upon the whole, and the Lord Chief Justice (Lord *Ellenborough*) in pronouncing that judgment stated all the material facts upon which the judgment of the court was founded.

Lord *Ellenborough*, C. J.

Conway
Gay.
Conway
Forbes.
Maury
Shedden
Hil. Te.
49 Geo.

These were cases in each of which the plaintiffs claimed a right to abandon in consequence of the *American* embargo in *December* 1807, and the main question in each was the same. The first was upon a policy on goods on board the *Swift*, at and from *New York* to *Liverpool*, and the interest was averred in one count to be in the plaintiffs jointly; in another, in one of them only, i. e. *Thomas Davidson*; and in a third, in one *John Townsend*. *Townsend* was a resident citizen of *America*, and had consigned the goods to the plaintiffs for sale, on his (*Townsend's*) account and risk. The plaintiffs, *Conway* and *Davidson*, are *British* subjects, carrying on business as merchants in partnership at *Liverpool*; *Conway* residing at *Liverpool*, and *Davidson* having for some time past resided in *America*. The invoice and bill of lading are dated the 29th of *December* 1807. Before the shipment *Davidson* had agreed to grant *Townsend* an anticipation of 600*l.* on account of these and certain other goods, by bills on the plaintiffs: and accordingly, on the 7th of *November* 1807, bills to that amount were drawn by *Townsend* on the plaintiffs; and these bills were accepted by *Davidson*, the partner of *Conway*, in *America*, within a day or two after their date, and were paid when due by the plaintiffs. The plaintiffs have been reimbursed part of the amount of these bills; but 212*l.* 18*s.* 3*d.* is still due to them upon that transaction. This policy was sub-

an embargo on all ships and vessels in their ports. By this embargo this vessel was detained; and as soon as they heard of the detention, the plaintiffs abandoned. It is stated indeed, in the case of *Conway v. Gray*, that the plaintiffs abandoned the vessel and nothing is said as to the goods; and as the insurance was on the goods, an abandonment of the vessel could give no claim; but we presume that this is a mistake, and that the goods were abandoned.

In the second cause (*Conway* and another v. *Forbes*) the facts are nearly similar. The policy was upon goods in the same ship; those goods were shipped by *Alexander Macomb*, a resident *American* citizen: they were consigned to the plaintiffs, on *Macomb's* account and risk. *Davidson* agreed to grant *Macomb* an anticipation of 7500*l.* by bills on the plaintiffs, accepted by *Davidson* in *America*; and the plaintiffs have paid 2500*l.* upon those bills. The bill of lading and invoice are dated at *New York*, the 24th *December* 1807, and the policy is dated the 25th *January* 1808. The plaintiffs charged the premium to *Macomb*.

In *Maury v. Shedden* the policy was upon ship valued at 6000*l.* and *James Maury* Esquire, the *American* consul, who was then resident at *Liverpool*, was the sole owner. Mr. *Maury* is a native of *America*, but came to reside at *Liverpool* as a merchant in 1786; and from the year 1790 has been the *American* consul there. The ship is an *American* vessel, and registered there under a privilege allowed by the navigation laws of *America* to their consuls.

Upon each of these cases this question arises; 1st. Whether the *American* embargo will warrant an abandonment by or on behalf of an *American* subject: and if not; then a second question arises in the first and second causes; whether *Conway* and *Davidson*, as consignees of the goods, being in advance to the consignors and under acceptances for them, (in one case the plaintiffs being in advance and also under acceptances; in the other case against *Forbes*, the plaintiffs were only under acceptances,) have a right to apply the policies to their own interests, as

each is a party to the public authoritative acts of his own government; and on that account, a foreign subject is as much incapacitated from making the consequences of an act of his own state the foundation of a claim to indemnity upon a *British* subject in a *British* court of justice, as he would be if such act had been done immediately and individually by such foreign subject himself. This seems to be established by *Tousseng v. Hubbard*, 3 Bos. and Pull. 291. That was an action by the owners of a *Swedish* vessel against a *British* subject, for not supplying the vessel with a cargo at *Saint Michael's*. The sailing of the ship from this kingdom had been prevented, a considerable time, and until it was too late for the fruit season at *Saint Michael's*, by an embargo here upon *Swedish* vessels. That embargo was in the nature of reprisals for what were considered acts of aggression by the *Swedish* government. The court was of opinion, that if that had not been the case of a *Swede* against a *British* subject, the plaintiff would have been entitled to recover: but as the embargo was produced by acts of the *Swedish* government, and every *Swede* was to be considered a party to those acts, it was in effect the plaintiff's own fault that his vessel was detained; and then loss which resulted from it was one he ought himself to bear. He was bound to proceed with all convenient speed: the acts of his government led to his being prevented; he was considered as a party to those acts; and was, therefore, looked upon as having failed in his part of the contract, viz. proceeding with all convenient speed. In the cases now before the court, the foundation of the abandonment is an act of the *American* government. Every *American* subject is to be considered as a party to that act: and has, virtually, the concurrence and consent of all, and amongst the rest, the concurrence and consent of the assureds in these cases: the assureds, therefore, have joined in a resolution, that the ships in question shall not be allowed to sail, but shall remain in their ports: and is it possible for them afterwards to make their not sailing the foundation of an action? The party who himself prevents the act from being done has no right to call upon the underwriters to indemnify him against the loss he may sustain from such act not being done. Where the insured and the insurer are both subjects of the same state, the question will

As to the second question, whether the consignees have not a right to apply the policies to their own interests, and to abandon on that account; we are of opinion that they have not. It might perhaps be difficult to make out that they had such an interest as was capable of abandonment, because they were to have no control over the goods but upon their arrival in *England*; and it may also be very questionable whether any policy, which is effected clearly to cover the interest of the consignor, can be applied to protect the interest of the consignee. But the particular ground of our decision is this, that where a policy is effected on behalf of the consignor, and the conduct of the consignor, or of the state to which he belongs, has taken away from him the right of enforcing it directly and effectually for his own benefit; the consignee is not at liberty to apply it to his interest, and enforce payment as though it had been made on his account. We do not say a consignee may not insure, we only say that he is so far identified in interest and right with his consignor, as not to be able to apply with effect to his own interest, which is derived out of that of the consignor, an insurance which was effected in order to cover the interest of the consignor, but which, upon the principle already stated, cannot be available for that purpose. The underwriter has an implied pledge from the assured, that he will do no act to obstruct the voyage, and when that pledge is broken by the person on whose account the insurance was made, can another person, who has paid no premium out of his own pocket, step in to take the benefit of that insurance, merely because his dealings with the assured would have enabled him to have insured in his own name? There is no case which decides that he can, and it would be gross injustice that he should. *Wolfe v. Horncastle*, 1 Bos. & Pull. 316. which was cited in the argument, goes no such length. In that case the plaintiffs had effected a policy to cover the interest of one *Lund* in a cargo, and had advanced 300*l.* on the credit of that cargo. The main question was, whether the policy were so effected as to cover *Lund's* interest, and if it were not, then it was contended that it might be applied to cover that interest which the plaintiffs had acquired by their advance of the 300*l.* The Court were unanimous that the policy was so effected as to cover *Lund's* interest;

tiffs had an insurable interest; and they seem to have thought the policy might have been applied to it, if it could not have been applied to *Lund's*. How does that case however bear upon this? *Lund* had done no act to forfeit his right upon the policy, and if he could not have recovered, would have been merely because the policy was not effected so as to be capable of covering his interest: the only objection made to *Lund's* interest being that *Wolffe* had made the insurance without orders or authority from *Lund*; and then if it could not apply to the 300*l.* the plaintiffs had advanced, it would have been applicable to nothing. Here the policies were effected so as to be capable of covering the consignor's interest, and for the express purpose of doing so: they are applicable to that, and the consignors have forfeited their rights by the act of their government. The case of *Wolffe v. Horncastle*, therefore, concludes nothing in favour of these plaintiffs. In truth in that case had the plaintiffs been allowed to recover upon their own interest, on account of the advance they had made, it would in substance have been suffering *Lund* to recover *pro tanto*; because then they could not have resorted to him for reimbursement: and in these cases, if *Conway* and *Davidson* were allowed to recover in respect of their advances, it would in substance be suffering the *American* consignors to recover *pro tanto*, because it would wipe off the claim which *Conway* and *Davidson* have upon them. In *Wolffe v. Horncastle* it would have been in favour of justice, because *Lund* had done nothing to forfeit his claim upon the policy: in this case it would be against justice, because these *American* consignors have done that by which their claim is precluded. For these reasons we are of opinion, that in each of these cases the *possea* must be delivered to the defendant."

Baring v.

Day, 8 East,

57. ante, p.

483.

In consequence of what fell from the Court in the case of *Baring v. Day*, in an act soon after passed "For preventing the various Frauds and Depredations committed on Merchants, Ship Owners and Underwriters by Boatmen and others, within the Jurisdiction of the Cinque Ports; and also for remedying certain Defects relative to the Adjustment of Salvage under a Statute

and which are evidently aimed at the deficiencies discovered by the Court in the former statute. "And whereas it is expedient that the like means of conclusively adjusting and recovering the *quantum* of the monies or gratuities to be paid to the several persons acting or employed in the salvage of any ship, vessel, or goods, should subsist and be by law applicable in cases where the salvors shall have acted under and by the mere employment and authority of the commander or other superior officer, mariners or owners of any ship or vessel in distress, as now by law provided for adjusting the *quantum* of such monies or gratuities which shall have become due in cases where application shall have been first made to officers of the customs, or other officer or officers in that behalf made and appointed in and by a certain statute made in the twelfth year of the reign of our late sovereign Queen *Anne*, intituled, &c. be it therefore enacted and declared, by the authority aforesaid, that from and after the passing of this act, all and every means which in virtue of the statute last-mentioned subsist, and may now be by law applied for the conclusively adjusting, and for the recovering of the *quantum* of the monies or gratuities to be paid to the several persons acting or being employed in the salvage of any ship, vessel, or goods, in cases where application shall have been first made pursuant to that statute to officers of the customs, or other the officer or officers therein in that behalf mentioned, and assistance shall have been thereupon rendered and had in pursuance of the provisions of that statute, shall be by law applicable and available in like manner to all intents and purposes, and in cases where the salvors shall have acted under by the mere employment and authority of the commander or other superior officers, mariners, or owners of any ship or vessel in distress, although no such application shall have been made to, nor any authority or assistance derived from any officers of the customs, or other the officer or officers in the said statute in that behalf mentioned; and that upon payment or tender and refusal of the *quantum* of monies or gratuities to be paid to the several persons, who shall have acted or been employed in such salvage, or in case such payment or tender cannot be made, or security being given for the due payment thereof to the satisfaction of the justices, who shall have adjusted such *quantum* of gratuities, it shall not be lawful for any officer of the customs, or other per-

48 Geo. 3.
ch. 130.
s. 21.

vessel, or goods, any longer to retain the possession or custody of the same, or any part thereof by reason or pretence of any claim or right to a compensation or gratuity for such salvage as aforesaid, or for having acted or been employed therein.

Sect. 22. Provided always, that in cases where the salvors shall have acted without application made to, or without any authority derived from any officer of the customs, or other officer in the said act mentioned, and the commander or other superior officer, mariners, or owners of such ship or vessel so saved as aforesaid, or the merchant or other person whose goods shall be so saved, or their agents as aforesaid shall disagree with such salvors touching the *quantum* of the monies or gratuity deserved by any person so employed as aforesaid, it shall be lawful for the commander of such ship or vessel so saved, or the owner of the goods, or merchant interested therein, or their agents, and for such salvors as aforesaid, to nominate three of the neighbouring justices of the peace to adjust the *quantum* of the monies or gratuities to be paid to such salvors, and in case the parties shall not agree in such nomination, that then, on the application of any of the parties to any one neighbouring justice of the peace, the justice so applied to shall nominate two other neighbouring justices of the peace; and such three neighbouring justices shall and may thereupon, and they are hereby authorized and required to adjust the *quantum* of the monies and gratuities to be paid to all and each of such salvors who shall disagree with such master, commanding officer, merchant, or owners, or their agents as aforesaid, touching the *quantum* of monies or the gratuity to be paid to him or them respectively, for his or their having been employed and acted in such salvage as aforesaid.

The following Case seems too important on the Subject of *Representation*, at the Time of signing the Ship, to be omitted in this Place.

The ship was captured by a *French* privateer with the goods on board, and the question was, whether the underwriters were discharged by a representation concerning her equipment.

It appeared, that about a week before the policy was signed the names of the underwriters were put down upon a slip when the broker stated to the defendant, "That the *Fanny* was to sail " with the *Hopewell* and *Young Roscius*, both armed ships, and " that she was herself to carry *ten guns and twenty-five men.*" There was no evidence of any conversation upon the subject having passed between the parties either when the policy was signed or in the intervening period. In fact, the *Fanny* sailed by herself, and carried only *eight guns and seventeen men.* It was contended, that the ship was sufficiently equipt to be seaworthy, and that what was said, when the defendant's name was put upon the slip, could not be considered as a representation which the assured were bound to comply with, as the slip was no evidence of the contract, and the Court could only look to what took place when the policy was subscribed. This very point Ante 473. had been lately decided in *Dawson v. Atty*, 7 East, 367. where it was held, that although the broker, when the slip was subscribed, had said that the ship was an *American*, yet, as he had not represented her to be of any particular country at the time when the policy was subscribed, she did not require to be documented as an *American*, and, although she was captured for want of a certificate required by a treaty between the government of the captors and the United States of *America*, the owner of the goods recovered against the underwriters.

Lord *Ellenborough*.—" If a representation is once made, it is to be considered as binding, unless there is evidence of its being afterwards altered or withdrawn. In the case cited the vessel was stated to be an *American* when the slip was made out; but when the policy came to be signed, the broker said generally, " That it was an insurance on goods in the *Hermion*," without describing her as of any particular country. There the first conversation was qualified and controuled by what followed. But here there is no evidence of any conversation upon this

taken place when the insurance was talked of, and the terms of it agreed upon, it must be referred to the policy, and treated as a representation, which required to be substantially complied with on the part of the assured."

It had for some time been a question at the bar, where the port, to which the vessel was insured, had fallen into the enemy's hands before the arrival of the ship, whether the ship still continued under the protection of the policy to a place of safety. The better opinion at the bar was, that the vessel was not protected, for that the underwriter might justly say, I contracted to insure your ship to *A.* but not to *B.* This point came directly before the Court in the following case :

Parkin v.
Tunno,
Easter T.
49 G. 3

The insurance was on goods on board the ship *Laurel*, at and from *Bristol* to *Monte Video*, and any other port or ports in the *River Plate*, in possession of the *English*; and the plaintiff declared on a loss by perils of the sea. It appeared at the trial at *Guildhall*, before Lord *Ellenborough*, that when the vessel appeared in the *River Plate*, *Monte Video*, and every other port in that river, except *Maldonado*, was in the possession of the enemy, (there being then war between *Great Britain* and *Spain*), and the *English* commander of *Maldonado* ordered the vessel away immediately upon her arrival, in consequence of the urgency of public affairs whereupon the vessel, being short of water and in want of repairs, bore away directly for *Rio Janeiro* in the *Brazils*, being the nearest friendly port of safety, and in her course thither she met with a peril of the sea, to which the injury sustained by the goods might fairly be attributed in the absence of any direct evidence of a prior cause of damage. It was therefore insisted upon at the trial, and now again in moving to set aside the nonsuit, that the ship not being able, under these circumstances, to proceed to any port in the *River Plate*, in the possession of an enemy, and being ordered away from *Maldonado*, immediately after her arrival there, by the authority of the *British* commander, whom the master was bound to obey, the policy continued to cover her to the nearest port of safety, to

ing a contract for a specific voyage could not be extended by implication to cover the ship in her voyage to *Rio Janeiro*, notwithstanding the circumstance which had occurred to induce the necessity of it. The rule was refused.

I know that the very learned gentleman, who brought this before the Court, was desirous to have their opinion on it, as his own sentiments were similar to those pronounced by Lord *Ellenborough*; but a decision respecting which became extremely material, as similar cases must frequently occur in practice.

An action was brought on a policy of insurance on the American ship, the *Maryland Mary*, at and from *Gibraltar* to a market, with leave to call and land goods at two or more ports in the *Mediterranean*. The ship having landed some goods at *Malta*, proceeded from thence on the 17th of *May* 1807, with the rest of her cargo for *Smyrna*, but was the same day captured by a *Russian* privateer, and being afterwards carried into *Corfu* was there condemned as lawful prize.

Donaldson
v. Thomson,
& Campbell,
429.

The defence set up by the underwriters was, that this American ship, by sailing for *Smyrna*, had violated the laws of neutrality; as that port was then blockaded by the *Russians*. However the only evidence adduced to shew that the captain knew of the blockade before he left *Malta*, was the sentence of condemnation, in which this fact was positively averred. Upon the validity of this sentence, therefore, the cause intirely depended. It was pronounced by a prize commission which sat in *Corfu* in *July* 1807, by the authority of the Emperor of *Russia*.

The plaintiff's counsel contended, on the authority of the case of the *Flad Oym*, 1 Rob. Rep. 144. that the supposed court could have no legitimate jurisdiction where it sat, and that its sentence was a nullity. *Corfu* was one of the islands which formed the *Ionian* republic, an independent government, recognized by the peace of *Amiens*, and which continued to preserve its neutrality amidst the struggles of the war. A belligerent, therefore, could have no right to

On the other side it was admitted, that if *Corfu* was to be considered as being at the time of the condemnation an independent neutral state, the sentence could not be supported. But they undertook to prove that it was substantially part of the territory of the *Russian* empire; and they insisted that this must be taken to be the case, if the *Russian* power was there dominant; if the supreme authority was vested in the *Russian* commander, although there might still be kept up some empty forms of an imaginary republic.

The condition of *Corfu*, in July 1807, was described by a gentleman who had acted there as *English* consul. He stated, that at the time there was a *Russian* garrison in *Corfu*, and the *Russians* had about 6000 men in the different islands of the republic; that they had made *Corfu* a military station for four or five years; and that they continued in possession of it till the peace of *Tilsit*, when they delivered it up to *Bonaparte*: but that, previously to that event, the flag of the *Ionian* republic flew from the forts in the island; there was a port admiral appointed by the *Ionian* republic; a consul from the Sublime Porte resided at *Corfu*, and the witness was recognized as *English* consul by the prince and senate of the *Ionian* republic, who continued in their functions till the republican government was dissolved by the *French*.

Lord *Ellenborough*.—"I will not receive the sentence under these circumstances, the *Russians* must be considered as visitors in *Corfu*, and not as sovereigns. While a government subsists as this did, we cannot look to the degree in which it might be overawed by a foreign force. The sentence was pronounced by a belligerent on neutral territory, and is therefore void. I am by no means disposed to extend the comity, which has been shewn to these sentences of foreign admiralty courts, I shall differ like Lord *Thurlow* in the belief, that they ought never to have been admitted. The doctrine in their favour rests upon an authority in *Steuart* (a), which does not fully support it; and the practice of receiving them of ten leads in its consequences to the

In the ensuing term, application was made to the Court to set aside this verdict, on the ground that the sentence of the *Russian* prize court had been improperly rejected. It was contended that *Corfu*, when occupied in the manner above-described by the *Russian* troops, was either to be considered as a part of the *Russian* empire, or as a co-belligerent with *Russia* against the Porte, since the Emperor of *Russia* derived the same advantages in a military point of view from this occupation of the island, as if he had seized it hostilely, or the *Ionian* republic had been his ally in the war he was carrying on. A rule *nisi* was reluctantly granted : but cause being shewn it was discharged.

Lord *Ellenborough*.—"It is impossible to say that the government of the *Ionian* republic was superseded at a time when its institutions subsisted, and its supremacy was recognized. How, then, was *Corfu* a co-belligerent? Only because it endured an hostile aggression. Will any one contend that a government which is obliged to yield in any quarter to a superior force, becomes a co-belligerent with the power to which it yields? It may as well be contended, that neutral and belligerent mean the same thing. Indeed this would make us co-belligerents with *France*, because we receded from *Corunna*."

In this case the policy was in the usual form on goods on board the *Volga*, "at and from *Hull* to the *Sound* and *St. Petersburg*, including the risk in craft from *Cronstadt*, with a memorandum in the margin of the policy, that in case of partial loss or damage, the net proceeds were to be the basis of contribution." The loss was averred, in different counts, to have happened of the goods and of the voyage by the perils of enemies, and by the arrest, restraint, and detainment of kings, princes, and people. The *Volga* sailed with the goods on board with convoy from *Hull* on the 10th *October* 1807, to the *Sound*, where she arrived. On the 16th she proceeded on her voyage, and was at anchor off the town of *Drago* on the 20th, when she was boarded by the crew of a boat from His Majesty's brig *Muscata*, with orders from His Majesty's officers for the *Volga* herself under the command of the King's ships in *C* roads, and the boat's crew remained on board to in-
dience to the orders. ~~She~~ ~~was~~ ~~at~~ ~~anchor~~

Foster &
others v.
Christie, B.
R. Easter,
T. 49 Geo.
3.

the 31st, when she went to *Helsingberg* roads for convoy, and remained there waiting for convoy until *Saturday* the 7th *November*, when she sailed on her voyage under the convoy of His Majesty's sloop of war the *Ganet*. The *Wolga* proceeded on her voyage in the *Baltic* till the 16th *November* when the commander of the *Ganet* informed the captain of the *Wolga* that an embargo was laid on the 15th on all *British* ships and vessels in the *Russian* ports; he at the same time ordered the *Wolga* to proceed no further on her voyage, but to keep close by him, and that the *Wolga* should receive orders from the commander in chief in *Copenhagen* roads as to her future destination: when the *Wolga* arrived off *Copenhagen* she was ordered by the King's officers to proceed down to *Helsingberg* roads, and afterwards the captain, under all the circumstances of the case, thought it best to proceed to *England*, which he did accordingly, under convoy of His Majesty's armed brig the *Providence*, and arrived at *Hull* on the 11th *December* 1807.

An embargo was in fact laid in the ports of *Russia* upon all *British* ships and vessels on the 15th day of *November* 1807, and war was declared, and hostilities commenced by the Emperor of *Russia* against *Great Britain* on the 18th *December* 1807, and hostilities have continued from that time to the present.

If the *Wolga*, however, had not been detained by the King's officers she would have arrived according to the usual course of the voyage at *St. Peterburg* and delivered her cargo there previous to the laying on of the embargo.

Upon the ship's arrival in the *Humber*, the goods insured were safely landed and deposited in the same state as when first put on board in the warehouses of the plaintiffs' agents, where they remained when the action was brought. On the 28th *December* the plaintiffs abandoned the goods to the defendant and the other underwriters.

Lord *Ellenborough*.—"There is nothing in the case. Suppose there had been a detention by convoy; one ship sails faster than another; or suppose the winds and tides had been against them, been could have

have arrived in sufficient time to avoid the effects of the embargo."

Judgment for the defendant.

This was an action on a policy of insurance made on the 20th of October 1807, on goods on board the ship *Susannah*, "from London to Helsingberg, the Sound, Copenhagen, all or either." Atkinson v. Abbott.
B. 2. Easter
T. 49 G. 3.

It appeared that, previous to such insurance, a great naval and military force had been sent from this country to *Copenhagen* for the purpose of taking possession of the *Danish* capital and the fleet lying in that port, and that the *British* armament had effected this purpose, and had possessed themselves of *Copenhagen* after a bombardment, which ended in a capitulation, by which it was agreed to be evacuated by the *British* forces on the 10th of October, though, in fact, owing to some unavoidable delay, the evacuation did not take place till the 20th, but the fact of such evacuation was of course unknown at the time of the policy being effected; and though intelligence of it had reached this country before the vessel sailed from the *Nore*, and though the captain admitted, on his examination at the trial, that he had heard the report, yet he swore he did not believe it. The government, however, having anticipated the probability of hostilities with *Denmark*, consequent on the expedition and seizure of the *Danish* fleet, an order of the King in council, issued on the 2d of September 1807, prohibiting the clearing of any *British* ship from this country for any port in the dominions of the King of *Denmark*; in consequence of which no clearance could have been obtained by this vessel for any such port. And therefore though the true object of the adventure was to carry out provisions for the *British* armament, then supposed to be at *Copenhagen* or *Elfsneur*, yet the captain on the 15th of October took a custom house clearance for *Helsingberg*, a *Swedish* and neutral port, to which he had no intention at the time to go; his consignees being *British* merchants at *Copenhagen* and *Elfsneur* and his bills of lading for the *Sound* and *Copenhagen*. It appeared to be usual at the custom house to take out a clearance for one only of the ports to which the ship was destined. The policy was effected on the 20th, and he sailed from the *Nore* on the 22d of October, and was captured by a *Danish* vessel on the

Copenhagen, where he still expected to meet the *British* armament, and Mr. *Blanrock*, his consignee on board a ship off that port. The jury were satisfied of the honest intention of the assured and of the captain in this adventure, to supply the *British* armament with the provisions which were the subject of the insurance; and being advised by Lord *Ellenborough* that the insurance was not avoided by the custom house clearance having been taken out for *Helsingberg* under these circumstances, to which there was no contemplation at the time of proceeding, unless any circumstances should occur in the prosecution of the adventure to render it necessary, found a verdict for the plaintiff. Whereupon a rule was applied for in the last term for setting aside the verdict, and granting a new trial on the ground, that the taking out a custom house clearance for a place to which there was no intention of going in the course of the voyage, was such a fraud as avoided the policy. After this case was fully argued,

Lord *Ellenborough* said,—“ I am perfectly satisfied, and so were the jury on the trial, that the voyage was not illegal either in intention or in act, but that the adventure was taken for the meretorious purpose of supplying the *British* fleet and forces, then understood to be in the possession of *Copenhagen*. And though an order of the King in-council, contemplating that this kingdom might be placed in a state of warfare with *Denmark* in consequence of the measures then meditated or in execution, had issued on the 2d of *September*, preceding the policy in question, and though intelligence of the capitulation had been received in this country before the policy was effected, and the evacuation of *Copenhagen* was thus contemplated to take place on the 10th *October*, yet that will not affect the honesty or legality of the transaction. The adventure may be said to have begun on the 16th of *October*, when the vessel left her moorings in the river; the object of it was to supply the *British* fleet and forces engaged in the expedition to *Copenhagen* with provisions; and though the evacuation of the place was contemplated to take place on the 10th, yet circumstances might intervene to delay the departure of our forces, their provisions might be expected to be at a loss; the consignment was made, not to the subjects

was expected to be found on board a *British* ship off that port. There could then be no objection to the legality of the adventure, if the avowed object of it had been disclosed, and the ship had cleared out at once for *Copenhagen* at this period: but the order of council stood in the way of getting a clearance for *Copenhagen* which had been issued as a precautionary measure to prevent the vessels of this country from being detained in the *Danish* ports in the event of hostilities: to obviate this difficulty the clearance was taken out for *Helsingberg*, a *Swedish* port, without any purpose of defeating the order of council, or trading with any enemy. This is conditionally done upon adventures for supplying the *British* armies and fleets in foreign service. Nor is it to be taken for granted that in no event whatever was the ship to go into *Helsingberg* in the prosecution of this adventure. The captain had certainly no immediate intention of going there, but if he found that the *British* armament had left the *Danish* territories before his arrival, he might have found it expedient to proceed to the neighbouring *Swedish* port, which he was entitled to do within the terms of the policy. But I am satisfied that would not have made the insurance illegal if the captain had never meditated to go into *Helsingberg* at all. There is nothing illegal so as to avoid a policy in the mere circumstance of the ship taking out a clearance for a place named in the policy to which there is no intention of going. The statute of 13 & 14 Car. 2. c. 11. s. 3. only gives a penalty of 100*l.* for taking out a false clearance; but there is nothing in that act to make the voyage illegal. That was determined in *Planché v. Fletcher*, Douglas, 251. and though the particular statute is not referred to in the report of the case, yet the provision of it was probably in the contemplation of the Court. And here the object of the voyage was not illegal but meretricious. The assured never meant to go to a *Danish* port, as such, but merely for the supply of the *British* fleet and army then supposed to be lying off *Copenhagen*. And the jury was quite satisfied of the fact."

Mr. Justice Grose declared himself of the same opinion.

Mr. Justice Le Blanc.—"If it had been made
denial, that this was a ~~mere~~ ^{mere} intention, only the

defendant failed in his attempt to do that, and the jury were satisfied that that was not the object of the adventure. The obvious intention of it, and so it was understood by the jury, was to supply our own fleet and army off *Copenhagen*: and if on his approach to that place the captain had not found the fleet there, he would probably have gone to *Helsingberg*. It has been determined that the mere circumstance of taking a clearance to a place, where a ship does not intend to go, does not make the voyage illegal so as to vacate the policy: but I am not satisfied that the captain had determined not to go to *Helsingberg* in any event."

Mr. Justice Bayley.—"The whole of the evidence shews that the object of the voyage was to supply our fleet engaged upon the expedition to *Copenhagen*, with provisions, and not to run into an enemy's port, where the vessel would be sure to be captured."

Rule discharged.

APPENDIX, No. I.

Policy of Insurance on Ship or Goods.

In the Name of God, Amen.

as well in own Name, as for and in
the Name and Names of all and every other Person or Persons to
whom the same doth, may, or shall appertain, in Part or in All,
doth make Assurance, and cause
and them and every of them to be insured, lost, or not lost, at and
from

upon any Kind of Goods and Merchandizes, and also upon the Body,
Tackle, Apparel, Ordnance, Munition, Artillery, Boat and other
Furniture, of and in the good Ship or Vessel called the

whereof is Master, under God, for this present Voyage,

or whosoever
elle shall go for Master in the said Ship, or by whatsoever other Name
or Names the same Ship, or the Master thereof, is or shall be named
or called; beginning the Adventure upon the said Goods and Mer-
chandizes from the loading thereof aboard the said Ship,

upon the said
Ship, &c.

and so shall continue and
endure, during her Abode there, upon the said Ship, &c. And
farther, until the said Ship, with all her Ordnance, Tackle, Apparel,
&c. and Goods and Merchandizes whatsoever, shall be arrived at

upon the said
Ship, &c. until she hath moored at Anchor Twenty-four Hours in
good Safety; and upon the Goods and Merchandizes, until the same
be there discharged and safely landed. And it shall be lawful for the
said Ship, &c. in this Voyage, to proceed and sail to and touch and
stay at any Ports and Places whatsoever

without Prejudice to this Insurance,
the said Ship, &c. Goods and Merchandizes, &c. for so much as
concerns the Assureds by Agreement between the
pers in this Policy are and shall be valued at

they are of the Seas, Men of War, Fire, Enemies, Pirates, Rovers, Thieves, Jettisons, Letters of Mart and Counter-mart, Surprizals, Takings at Sea, Arrests, Restraints, and Detainments of all Kings, Princes, and People, of what Nation, Condition, or Quality soever, Barratry of the Master and Mariners, and of all other Perils, Losses and Misfortunes, that have or shall come to the Hurt, Detriment, or Damage, of the said Goods and Merchandizes and Ship, &c. or any Part thereof. And in Case of any Loss or Misfortune, it shall be lawful to the Assured, their Factors, Servants, and Assigns, to sue, labour and travel for, in and about the Defence, Safeguard, and Recovery of the said Goods and Merchandize and Ship, &c. or any Part thereof, without Prejudice to this Insurance; to the Charges whereof we the Assurers will contribute each one according to the Rate and Quantity of his Sum herein assured. And it is agreed by us the Insurers, that this Writing or Policy of Assurance shall be of as much Force and Effect as the surest Writing or Policy of Assurance heretofore made in *Lombard-street*, or in the *Royal Exchange*, or elsewhere in *London*. And so we the Assurers are contented, and do hereby promise and bind ourselves, each one for his own Part, our Heirs, Executors, and Goods to the Assured, their Executors, Administrators and Assigns, for the true Performance of the Premises, confessing ourselves paid the Consideration due unto us for this Assurance by the Assured

at and after the Rate of

In Witness whereof we the Assurers have subscribed our Names and Sums assured in *London*.

N. B. Corn, Fish, Salt, Fruit, Flour, and Seed, are warranted free from Average, unless general, or the Ship be stranded; Sugar, Tobacco, Hemp, Flax, Hides, and Skins, are warranted free from Average, under Five Pounds *per Cent*. And all other Goods, also the Ship and Freight, are warranted free of Average under Three Pounds *per Cent*. unless general, or the Ship be stranded.

APPENDIX, No. II.

Form of a Respondentia Bond.

KNOW all Men by these Presents, That

held and firmly bound to

in the Sum, or Penalty of
of good and lawful Money of

Great Britain, to be paid to the said

or to certain Attorney, Executors, Admin-
istrators, or Assigns; to which Payment, well and truly to be
made Heirs, Executors, and Ad-
ministrators, firmly by these Presents, sealed with
Seal. Dated this

Day of in the Year of the
Reign of our Sovereign Lord by the Grace of
God, of *Great Britain, France, and Ireland*, King, Defender of the
Faith, and so forth, and in the Year of our Lord One thousand
eight hundred and The Condition
of the above-written Obligation is such, that whereas the above-
named hath, on the Day of the

Date above-written, lent unto the above-bound

the Sum of upon the Merchandize
and Effects, to that Value laden, or to be laden, on board the good
Ship or Vessel called the of the Burthen
of Tons or thereabouts, now in the River
Thames, whereof is Commander. If the said

Ship or Vessel do, and shall with all convenient Speed, proceed
and sail from and out of the said River of *Thames*, on a Voyage
to any Ports or Places in the *East Indies, China, Persia*, or else-
where beyond the *Cape of Good Hope*, and from thence, do and
shall sail and return unto the said River of *Thames*, at or before
the End and Expiration of Thirty-six Calendar Months, to be ac-
counted from the Day of the Date above-written, and that with-
out Deviation (the Dangers and Casualties of the seas excepted).
And if the above-bound

Heirs, Executors, or Administrators, do and shall, within

Days next after the said Ship, or Vessel, shall be
arrived in the said River of *Thames*, from the said Voyage at
the End and Expiration of the said Thirty-six Calendar Months,
to be accounted as aforesaid (well and truly said) first
and next happen) well and truly
above-named

of Great Britain, together with

of like Money, by the Calendar Month, and so proportionally for a greater or lesser Time than a Calendar Month, for all such Time, and so many Calendar Months, as shall be elapsed, and run out of the said Thirty-six Calendar Months, over and above twenty Calendar Months, to be accounted from the Day of the Date above-written; or if in the said Voyage, and within the said Thirty-six Calendar Months, to be accounted as aforesaid, an utter Loss of the said Ship, or Vessel, by Fire, Enemies, Men of War, or any other Casualties shall unavoidably happen; and the above-bound

Heirs, Executors, or Administrators, do and shall, within Six Months next after the Loss pay and satisfy to the said

Executors or Administrators, or Assigns, a just and proportional Average on all Goods and Effects which the said

carried from England on board the said Ship or Vessel, and on all other the Goods and Effects of the said which shall acquire during the said Voyage, and which shall not be unavoidably lost: then the above-written Obligation to be void, and of no Effect; or else to stand in full Force and Virtue.

Sealed and delivered (being
first duly stamped) in the
Presence of

J. J.

APPENDIX, No. III.

Form of a Policy of Insurance upon a Life.

In the Name of God, Amen.

do
make
Life
the Term and Space of

make
to be assured upon
aged

Assurance, and
natural
for and during

Calendar months, to commence this

within the Time aforesaid, which the above Governor and Company do allow to be good and sufficient Ground and Inducement for making this Assurance, and do agree that the Life of

the said is and shall be rated and valued at the Sum assured : The said Governor and Company therefore, for and in Consideration of *per Cent.* to them paid, do assure, assume, and promise, that

the said shall, by the Permission of Almighty God, live, and continue in this natural Life, for and during the said Term and Space of Calendar

Months, to commence as aforesaid ; or in Default thereof, that is to say, in case the said

shall, in or during the said Time, and before the full End and Expiration thereof, happen to die, or decease out of this World by any Way or Means whatsoever, that then the aforesaid Governor and Company will well and truly satisfy, content, and pay unto the said

Executors, Administrators, or Assigns, the Sum or Sums of Money by them assured, and are here underwritten, hereby promising and binding themselves and their Successors to the Assured, Executors,

Administrators, or Assigns, for the true Performance of the Premises, confessing themselves paid the Consideration due unto them for this Assurance by the Assured. *Provided* always, and it is hereby declared to be the true Intent and Meaning of this Assurance, and this Policy is accepted by the said

upon Condition that the same shall be utterly void and of no Effect, in case the said shall exceed the *Age*

of or shall voluntarily go to *Sea* or into the *Wars*, by Sea or Land, without Licence in Writing first had or obtained for so doing, any Thing in

these Presents to the contrary hereof in anywise notwithstanding. In witness whereof the said Governor and Company have caused their common Seal to be hereunto affixed, and the Sum or Sums by them assured to be here underwritten, at their office in *London*, this

Day of

in the

Year of the Reign of our Sovereign Lord by the Grace of God, of the United Kingdom of *Great Britain* and *Ireland*, King, Defender of the Faith, &c. and in the Year of our Lord One thousand eight hundred and

The said Governor and Company are content with this Assurance for *£*.

APPENDIX, No. IV.

Form of a Policy of Insurance against Fire.

BY the Corporation of the *Royal Exchange Assurance*
of Houses and Goods from Fire

This present Instrument or Policy of Assurance witnesseth, That whereas agreed to pay into the Treasury of the Corporation of the *Royal Exchange Assurance*, at their Office on the *Royal Exchange, London*, for the Assurance of from Loss or Damage by Fire. *Now know all Men by these Presents*, That the capital Stock, Estate, and Securities of the said Corporation shall be subject and liable to pay, make good, and satisfy unto the said Assured Heirs, Executors, or Administrators, any Loss or Damage which shall or may happen by Fire to the said Goods ^{aforesaid} (except such Goods as Hemp, Flax, Tallow, Pitch, Tar, Turpentine, Glass, China, and Earthen Wares, Writings, Books of Accounts, Notes, Bills, Bonds, Tallies, ready Money, Jewels, Plate, Pictures, Gun-powder, Hay, Straw, and Corn unthreshed), within the Space of twelve Calendar Months from the Day of the Date of this Instrument or Policy of Assurance, not exceeding the Sum of

and shall so continue, remain, and be subject and liable, as aforesaid, from Year to Year, to be computed from the Day of in every Year, for so long Time as the said Assured shall well and truly pay, or cause to be paid, the Sum of into the Treasury of the said Corporation,

ration, on or before the Day of which shall be in each succeeding Year, and the said Corporation shall agree thereto by accepting and receiving the same; which said Loss or Damage shall be paid in Money immediately after the same shall be settled and adjusted, or otherwise, if the said Loss or Damage shall not be adjusted, settled, and paid within sixty Days after Notice thereof it be given to the said Corporation, by the said said Corporation, their Officers, Workmen, Charge of the said Corporation, at the End of Days, and supply the said

and of equal Value and Goodness with those burnt or damaged by Fire. *Provided always nevertheless*, and it is hereby declared to be the true Intent and Meaning of this Deed or Policy, That the said Stock, Estate, and Securities of the said Corporation shall not be subject or liable to pay or make good to the Assured any Loss or Damage by Fire, which shall happen by any Invasion, Foreign Enemy, or any military or usurped Power whatsoever. *Provided also*, That this Deed or Policy shall not take Place or be binding to the said Corporation until the Premium for one Year is paid, or in case the said Assured shall have already made, or shall hereafter make any other Assurance upon the Goods aforesaid, unless the same shall be allowed of and specified upon the Back of this Policy : or if the said

at the Time when any such Fire shall happen, shall be in the Possession of, or let to any Person who shall use or exercise therein the Trade of a Sugar-baker, Apothecary, Chymist, Colour-man, Distiller, Bread or Biscuit-baker, Ship or Tallow-chandler, Stable keeper, Inn-holder, or Maltster, or shall be made use of for the stowing or keeping of Hemp, Flax, Tallow, Pitch, Tar, or Turpentine ; but that in all or any of the said Cases these Presents, and every Clause, Article, and Thing herein contained, shall cease, determine, and be utterly void and of none Effect, or otherwise shall remain in full Force and Virtue. In Witness whereof the said Corporation have caused their common Seal to be hereunto affixed, the

Day of

in the Year of the Reign of our
Sovereign Lord by the Grace of God, of the United
Kingdom of Great Britain, and Ireland, King, Defender of the Faith,
&c. and in the Year of our Lord One thousand eight hundred and

N. B. This Policy to be of no Force, if assigned, unless such Assignment be allowed by an Entry thereof in the Books of the Company.

T A B L E

OF THE

P R I N C I P A L M A T T E R S.

Abandonment.

BEFORE a person insured can demand from the underwriter a recompence for a total loss, he must abandon to him whatever claims he may have to the property insured.

Page 109, 192

The time, within which such an abandonment must be made, was not fixed in *England* till lately by any positive regulation or decision. 110, 239

Abandonment is as ancient as the contract of insurance itself. 192

When an abandonment is made, it must be total, and not partial. *ibid.*

The insured may in all cases chuse not to abandon; but he cannot at his pleasure abandon, and thereby turn a partial into a total loss. 193

The insured may abandon to the underwriter, and call upon him for a total loss, if the damage exceed half the value; if the voyage be absolutely lost or not worth pursuing; if farther expence be necessary; or if the insurer will not engage at all events to bear that expence, though it should exceed the value, or fail of success. 194, 201, 208

But he cannot abandon, unless at some period or other of the voyage there has been a total loss; and if neither the thing insured, nor the voyage be lost, and the damage does not amount to a moiety of the value, he will not be allowed to abandon. 217

Abandonment must

if, at the time advice is received of the loss, it appears that the peril is over and the thing in safety, the insured has no right to abandon. *P.* 195, 207

Thus in a case where there was a capture and recapture, and it was stated that, at the time of the offer to abandon, the ship was safe in port, and had sustained no damage, the court held that the insured had no right to abandon. 205

But if the underwriter pay for a total loss, and it afterwards turn out to be but partial, the insured shall not be obliged to refund; but the insurer shall stand in his place for the benefit of salvage. 212

If the ship or goods are restored in safety between the offer to abandon and action brought, the assured cannot proceed as for a total loss. 213

If the voyage be defeated by damage done to the ship, the assured may abandon. 221

It is not a loss within the policy, for which the assured can abandon, and recover as for a total loss of cargo, that the port of destination has been shut by order of the enemy against ships of the nation to which the ship insured belongs.

If a ship, finding her port shut, sail back for her port without intending to voyage insured, the insurer is discharged.

Where a freight

Election to abandon, when to be made.

Page 239.

When notice of abandonment of a cargo must be given, to render the underwriters liable for a total loss. 156

Notice of abandonment necessary, though the ship and cargo had been sold, when notice of the loss was received. 240 note (a)

Action.

Action of *assumpsit* may be maintained by owner of ship against owner of part of the cargo, to recover proportion of general average. 179 note (a)

An action on the case lies against an agent for not having insured agreeably to the orders of his principal.

404 note (a)

The only difference between this action, and that on the policy against the underwriters, consists in form: for the plaintiff is entitled in this action to recover the precise sum he ordered to be insured; and the defendant has every benefit of which the underwriter could have taken advantage, such as fraud, deviation, non-compliance with warranty, &c. *ibid.*

Such an order to insure must be obeyed in the three following instances, otherwise this action will lie. First, where a merchant abroad has effects in the hands of his correspondent here. Second, where the merchant abroad has been *used* to send orders for insurance, and the one here to comply with them. Thirdly, if the merchant abroad send bills of lading, and engrave them an order to insure, as the term of acceptance. *ibid.*

and here accept an order for and limit the broker to too mium, by which means no n be procured, this action

ibid.

it, for

action must be *debt* or *covenant*, and they may plead generally.

Page 535, 536

When money has been paid by mistake to be insured, it may be recovered back in an action for money had and received to the plaintiff's use. 537
In order to recover against a private underwriter upon the policy, the form of action is a special *indebitatus assumpsit*, founded upon the express contract. *ibid.*

The action may be brought in the name of the broker effecting the policy.

Within fifteen days after action brought, plaintiff, after request in writing, must declare the amount of all insurances on the same ship. 544

See title *Declaration*.

Adjustment.

When the quantity of damage sustained in the course of the voyage is known, and the amount which each insurer is to pay is settled, it is usual for the underwriter to indorse on the policy, "adjusted this loss at so much *per cent.*" This is an adjustment. 161

After an adjustment has been signed by the underwriter, if he refuse to pay, the owner has no occasion to go into the proof of his loss, or any of the circumstances. It is to be considered as a note of hand. 162

This rule has been since relaxed and explained. 163

Although an underwriter sign an adjustment, until he actually pays the loss he may avail himself of any defence, either upon the facts or the law of the case. 165

At least, unless his attention was particularly called to all the circumstances of the case, before he signed

166

default upon a va-

4's title to re-

the amon-

the r

total loss, the insured is not obliged to refund, if it should afterwards turn out to be partial; but the insurer will stand in the place of the insured

Page 16;

Admiralty.

The sentence of a *French* consul resident in a neutral country upon a ship brought in there, is void by the law of nations. *ibid.*

But sentence procured by captors in country of co belligerent, good. 463

The sentence of a foreign Court of Admiralty is conclusive, as to every thing contained in it; but where the cause of condemnation of a ship does not appear to be on the specific ground material to the point in issue, parole evidence must be allowed to explain it. 464

Thus it is not conclusive to shew that a ship was not neutral, unless it appeared that the condemnation went on that ground. *ibid.*

A sentence of such a court cannot be controverted collaterally in a civil suit. 466

If it appear evident that the sentence proceeded upon the ground of the property not being neutral, that is conclusive evidence against the insured, that he has not complied with his warranty, and the underwriter is discharged. 469, 470

Even where no special ground of condemnation is stated, but the ship is condemned as good and lawful prize, the Court here must consider it as conclusive evidence that the property was not neutral. 471

If a foreign Court condemn a neutral as enemy's property for violating a list of the crew required by such ordinance, and if the condemnation is within the time between the capture and the condemnation.

a warranty of being an *American*.

Page 473, note (a)

If a neutral ship be restored, but damages and costs denied to the claimants, because they had not fully complied with certain *French* ordinances, the assured may recover for the detention notwithstanding.

474. note (a)

But if the ground of decision appear to be not on the ground of not being neutral, but on a foreign ordinance, manifestly unjust, and contrary to the laws of nations, and the insured has only infringed such a partial law, that shall not be deemed a breach of his warranty, so as to discharge the insurer. 473

The only question in all these cases is this, did the Court of Admiralty mean to decide the question whether the property belonged to an enemy or not? if they did mean to decide that question, though they may have decided erroneously, it is conclusive evidence, that the warranty is not true; and the assured cannot be allowed to controvert the fact so established.

474 497

Where a foreign sentence promises to proceed on an infraction of treaty, such sentence conclusive against warranty. 486

Foreign sentence evidence only of what it directly asserts in the adjudicative part of it. 495

If the ship be condemned as prize, and the grounds of the sentence appear manifestly to contradict such a conclusion, the Court here will discharge the insurers, by deeming the insured has forfeited its neutrality.

A ship warranted neutral, if a Court condemn her on the ground of being an enemy's property, for violating a list of the crew required by such ordinance, and if the condemnation is within the time between the capture and the condemnation.

Agent.

Where an agent is proved to have had authority to subscribe the policy, he shall be presumed to have authority to sign the adjustment. Page 162

Wherever there has been an allegation of falsehood, a concealment of circumstances, or a misrepresentation, it is immaterial whether it be the act of the person himself who is interested, or of his agent; for in either case the contract is found in deception, and the policy is consequently void.

276, 278

This rule prevails, even though the act cannot be at all traced to the owner of the property insured.

276

Agent not insuring according to directions is liable to an action.

404

Alien. See *Enemy.*

Alteration.

A policy cannot be altered after it is signed.

1

Unless there be some written document to shew that the intention of the parties was mistaken; or unless it be altered by consent of the parties.

3

In what cases alteration of policy permitted by 35 Geo. 3. c. 63. p. 37, 38, 39.

Amalfitan Code.

Some account of it. *Introd.* p. xxiv.

Apportionment.

See *Return of Premium.*

Arbitration,

See of, in a Policy. 535

Arrival.

Contin

Risk,

But in marine insurances, the policy may be transferred.

Page 596, note (a)

Assumpsit. See *Action.*

Assurance. See *Insurance.*

Average, General.

When goods are thrown overboard in a storm to lighten the ship, for the general safety of the ship and cargo, the owners of the ship and of the goods saved, are to contribute for the relief of those whose goods are ejected: this contribution is called a general average.

133, 170

Average and contribution in commercial writers are synonymous terms.

170

All loss which arises in consequence of extraordinary sacrifices or expences incurred for the preservation of the ship and cargo comes within the description of general average.

170

The doctrine of average was introduced by the *Rhodians*.

171

Three things, it is said, must concur to make the act of throwing goods overboard legal: 1st, That what is so condemned to destruction be in consequence of a deliberate and voluntary consultation between the master and men. 2d, That the ship be in distress, and that sacrificing a part be necessary for the preservation of the rest. 3d, That the saving of the ship and cargo be owing to the means used with that view. But the 2d seems to be the only material one.

171

To an action of trespass for throwing goods overboard a man pleaded that he did it *navis levandæ causâ*; and that only the passengers must have been saved. The plea was held

good

172

the throwing over the ship, here shall goods

property saved from the second accident shall contribute to the loss occasioned by the former jettison. *Page 172*
The various accidents and charges, which will entitle the suffering party to call for a contribution, enumerated. 173

If goods be put on board a lighter, to enable the ship to sail into a harbour, and the lighter perish, the owners of the ship and the remaining cargo are to contribute. *ibid.*

But if the ship be lost, and the lighter saved, the owners of the goods preserved are not to contribute. *ibid.*

Not only the value of the goods thrown overboard must be considered in a general average; but also the value of such as receive any damage by wet, &c. from the jettison of the rest. *ibid.*

If a ship be taken and carried into port, and the crew remain to take care of and reclaim her, the charges of reclaiming and the wages and expences of the ship's company during her arrest, and from the time of her capture, it is said, shall be brought into a general average. *Qu. 174*

Not to for sailors' wages and provisions, during performance of a quarantine. *ibid.*

Quere. Whether extraordinary wages and victuals, during a detention by a foreign prince, not at war, be a subject of average. 174, 175

It seems that wages, &c. during a detention to repair, are. *Qu. ibid.*

So where a ship is obliged to go into port for the benefit of the whole concern, the charges of loading and unloading, and the wages and provisions of the workmen hired for the repairs, are a general average. 175

Diamonds and jewels, which part of the cargo, must contribute according to their value. 177

Ship provisions, the passengers, jewels and do

Nor the wages of the sailors. *Page 176*
In order to fix a right sum on which the average may be computed, we should consider what the whole ship, freight and cargo, would have produced neat, if no jettison had been made; and then the ship, freight, and cargo are to bear an equal and proportional part of the loss. *ibid.*

The goods thrown overboard are to be estimated at the price for which the goods saved were sold, freight and all other charges being first deducted. 177

The contribution is, in general, not made till the ship's arrival at the port of discharge. 178

The insurer by his contract engages to indemnify the insured against all losses arising from a general average. *ibid.*

Contribution may be enforced in a Court of Equity. 179

Or an action at law may be maintained for it. 179. note (a)

Average Loss, vide Partial Losses.

Bankruptcy.

If the original insurer become a bankrupt, it shall be lawful for him or his assigns to make a re-assurance to the amount before by him insured, provided it be expressed in the policy to be a re-assurance. 370

The act was held to prohibit re-assurances on foreign ships, except in the case of bankruptcy or death of the first insurer. 372

If the insurer, after the writing of the policy, and before a loss happens, should become a bankrupt, he may prove his debt under commission, as if the loss happened previous to the bankruptcy underwriter.

This statute has been held to apply to the insurer.

under the commission, as if the event had actually happened. Page 569

Barratry.

It is barratry in the master to smuggle on his own account. 41

The derivation of the word "*barratry*" is very doubtful. 111

Any act of the master, or mariners, of a criminal nature, or which is grossly negligent, tending to their own benefit, to the prejudice of the owners of the ship, and without their consent or privity, is barratry. *ibid.*

It must be some breach of trust in the master *ex malificio*. 115. (n)

There must be something fraudulent to constitute barratry 121

It is not necessary, in order to make the insurers liable, that the loss should happen *in the very act of barratry*; for the moment the ship is carried from its proper track, with an evil intent, barratry is committed. 112, 119

But the loss in consequence of the act of barratry must happen *during the voyage insured*, and within the time limited in the policy. 42, 112

If the act of the captain be done for the benefit of his owners, and not with a view to his own interest, it is not barratry. 112

If the owner of the ship freight it out for a specific voyage, the freighter is to be considered as owner *pro hac vice*; and if the master commit a criminal act, without his privity, though with the knowledge of the original owner, it is barratry. 112, 118

Owners, by express words, underwriter, generally for the barratry of the mariners. 113

It is not necessary to state a ship to have been insured, and negligence of the master is a sufficient averment. *ibid.*

So if a ship take a prize, and, instead of proceeding on her voyage, the captain is forced by the mariners to return to port with the prize, against the orders of his owners, the captain is justified by necessity; and it is not barratry, because not done to defraud the owners. Page 115

A ship was insured from London to *Seville*; she was let to freight for the voyage; she sailed from London to the *Decons*, from thence she sailed to *Guernsey*, which was out of the course of the voyage. The captain went there to take in brandy on his own account, with the knowledge of the original owner of the ship, but not of the freighter for that voyage. This was held to be barratry. 116

A breach of an embargo is an act of barratry in the master. 120

If the captain cruise for, and take a prize, contrary to his owner's instructions, it is barratry. *ibid.*

If the master trade with the enemy, even with a view to the advantage of his owners, this is barratry. 121

An act of the captain, with the knowledge of the owners of the ship, though without the privity of the owner of the goods, who happened to be the person insured, is not barratry. 125

If the master of the ship be also the owner, he cannot be guilty of barratry. 127

The same rule prevails, if he commit an act, which would be barratry in any other master, even though he has mortgaged the ship. 128

The onus of proving the captain to be owner, lies upon the underwriter. *ibid.*

If the words "*in any lawful trade*" be inserted, still the underwriters are answerable, if the captain commit barratry, by smuggling on his own account. 129

If a mariner, belonging to the ship, is fully burnt or killed, the loss of any person, is recoverable.

death as a felon, without benefit of clergy. Page 130

If the offence be committed within the body of a county, the offender shall be tried in a court of common law; if upon the high seas, it shall be tried according to the directions of the 28th Henry 8, c. 15. 130, 131

It should seem a lender on bottomry would not be liable for any accident arising from the barratry of the master. 563

Bill of Lading. See *Lading*.

Bottomry and Respondentia.

Bottomry is a contract, by which the owner of a ship borrows money to enable him to carry on the voyage, and pledges the keel or bottom of the ship as a security for the repayment. 552

If the ship be lost, the lender also loses his whole money; but if not, he shall receive his principal and the stipulated interest, however it exceed the legal rate. *ibid.*

When the ship and tackle are brought home, they are saleable, as well as the person of the borrower, for the money lent. *ibid.*

When the loan is not made upon the vessel, but upon the goods, then the borrower only is personally bound to answer the contract, who is said to take up money at respondentia. *ibid.*

In this consists the chief difference between bottomry and respondentia; in most other respects they are the same. *ibid.*

There is a third kind of contract upon the mere hazard of the voyage, without any interest in the ship or goods. *ibid.*

This is prohibited as voyages.

The borrower or insurer the vessel and

All contracts made by any of his Majesty's subjects by way of bottomry on the ships of foreigners trading to the East Indies are null and void.

Page 553

Q. Whether an American ship, since the declaration of American independency, be a foreign ship within the statute? 554

Bottomry arose from the power given to the master of hypothecating the ship and goods for necessities in a foreign country. 555 & *ib.* note (a)

But the ship must be abroad, and in a state of necessity to justify such an act of the master. *ibid.*

This species of contract was known to the Rhodians. 557

The principle, upon which bottomry is allowed, is, that the lender runs the risk of losing his principal and interest; and therefore it is not usury to take more than the legal rate. 558

If a contract were made, by color of bottomry, in order to evade the statute, it would be usurious. 561

The legality of the contract defended. *ibid.*

But if the risk be not run, the lender is not entitled to the extraordinary premium. 562

The risks, to which the lender exposes himself, are generally mentioned in the condition of the bond; and are nearly the same against which the underwriter in a policy of insurance undertakes to indemnify. 563

But the lender is not liable for accidents arising from the misconduct of the borrower. *ibid.*

Piracy is one of the risks which the lender on bottomry runs.

If a loss by capture happen, recover against the borrower.

But this does not mean a recovery against the borrower; but it means to recover against the loss.

from the track of the voyage, the event has not happened upon which the borrower was to be discharged from his obligation. *Page 565*

If the borrower becomes bankrupt at the loan of the money, and before the event happens, which entitles the lender to repayment, the lender may prove his debt under the commission, as if the event had actually happened. *569*

Bottomry and respondentia may be insured, provided it be specified to be such interest in the policy. *12, 570*

Unless the usage of trade sanctions a different proceeding. *12*

When a person insures a bottomry interest, and recovers upon the bond, he cannot also recover upon the policy. *570*

A lender on bottomry or at respondentia is neither entitled to benefit of salvage, nor liable to average by the law of *England*. *176, 564*

It is otherwise in *France*, and in *Denmark*. *565*

But if a man insure respondentia interest on a *Danish* ship, and be obliged to contribute to an average loss by the laws of *Denmark*, *English* underwriters are bound to indemnify. *Ibid.*

2. Whether money may be lent on bottomry, or at respondentia to an enemy in time of war? *568*

Broker.

The broker, by the custom, is liable to be sued by the insurer for premiums, notwithstanding the acknowledgement by the insurer, in the policy, that he has received them. *30*

He may maintain an action against the insured, for premiums on his account. *34, 35*

He has a lien upon all the policies, and a general ba-

Capture.

AS between the insurer and insured, if the ship is to be considered as lost by the capture, though she be never condemned at all, nor carried into any port or fleet of the enemy, and the insurer must pay the value. *Page 88, 101*

If either before or after condemnation the owner retake her, and have paid salvage, the insurer must pay the loss so actually sustained. *88*

If the loss be paid by the underwriter before the recovery, he stands in the place of the insured, and will be entitled to the benefits of the restitution. *ibid.*

A capture having been illegal, but the charges and delay being great, the insured made a compromise, *bond fide* for the liberation of the ship; the underwriters were held to be answerable for the charges of that compromise. *89*

Before the statute of 19 *Geo. 2. ch. 37.* which abolished wager policies, the recapture had a considerable effect upon the contract of insurance. *92*

But now the contract is not at all altered between an insurer and an insured. *ibid.*

The opinions of foreign writers with respect to capture and recapture stated *93*

By the marine law of *England*, as practiced in the court of Admiralty, it was formerly held, that the property was not changed so as to bar the original owner in favour of a vendee or recaptor, till there had been a sentence of condemnation. *94, 188*

But now by statute this right of the original owner, in case of a recapture, is reserved to him for ever, and the payment of stated salvage to him. *95, 188*

By 19 *Geo. 2. ch. 37.* determined upon in the *P.*

If the ship be recovered before a demand for indemnity is made, the insurer is only liable for the amount of the loss actually sustained at the time of the demand. *Page 101*

Or, if the ship be restored at any time subsequent to the payment by the underwriter, he shall then stand in the place of the insured, and receive all the benefits resulting from such restitution. *ibid.*

See *Bottomry*.

Changing the Ship.

It being necessary, except in some special cases, to insert the name of the ship on which the risk is to be run in the policy, it follows as an implied condition, that the insured shall neither substitute another ship for that mentioned in the policy before the voyage commences; in which case there would be no contract at all; nor during the voyage remove the property insured from one ship to another, without consent of the insurer, or without an unavoidable necessity.

23, 383

If he do, the implied condition is broken, and he cannot, in case of loss, recover against the underwriter. *ibid.*

The ship on which the risk is to be run, forms a material part of the contract. *ibid.*

The opinions of *English* mercantile writers, and of foreign authors stated.

383, 384

Expressly held in *England* that the insured, except in cases of real necessity, have no right to change the bottom of the ship; for when an insurance is made on a specific ship, and the insured, without the consent of the underwriter, changes it, he has not kept his promise.

Commencement of the Risk.

On the goods, it is usually from the loading; on the ship, from the beginning to load. *Page 27*

On a policy, "at and from Bengal to England" the risk commences from the first arrival at Bengal. *51*

So at and from *Jamaica* to *London*. *52*

Compass (Mariner's.)

Invented by a native of *Amalfi*; and it contributed greatly to the revival of commerce. *Introduct. xxii.*

Coin.

Whether insurable as goods. *25*

Commission.

Whether commissions of a consignee of the cargo are insurable. *355*

Concealment, see Fraud.

Condemnation, see Admiralty.

Consent.

A policy previous to the stamp duty on policies might have been altered by consent, even after it was signed. *3*

Consolidation Rule.

For the history of the consolidation rule in insurance causes, see the Introduction, page *xliii.*

Construction of the Policy.

A policy must always be construed as nearly as possible, according to the intention of the contracting parties, and not according to the strict meaning of the words.

As policies are to be liberally construed, whatever is done by the usual course of trade is to be taken into consideration.

105

A policy on a ship generally from *A.* to *B.* was construed to mean till the ship was unloaded. Page 40. 41

But if it contained the usual words "*till moored twenty four hours in safety*;" the insurers shall be answerable for no loss that does not happen before the expiration of the time. 41

Even though the loss was occasioned by an act committed during the voyage insured. *ibid.*

If a ship be insured for six months, and three days before the expiration of the time, receive her death's wound, but by pumping is kept afloat till three days after the time, the insurer is discharged. 43

The loss must happen during the continuance of the voyage, or within 24 hours after her mooring at the port of destination. 44

Under a policy containing those words, the underwriters were held liable for a subsequent loss; because the captain the very day on which the ship arrived at her moorings, was served with an order from government to return in order to perform quarantine; and therefore the ship could not be said to have moored 24 hours in safety, although she did not go back for some days. 45

In a policy upon freight, if an accident prevent the ship from sailing, the insured cannot recover the freight, which he would have earned, if she had completed her voyage. 46

But if the policy be a *valued* policy, and part of the cargo be on board when such accident happens, the insured recover to the whole amount. *ibid.*

from stress of weather, is in a bad condition, and goes to the place to refit, it is to be on the same footing, as if she had been in a good place, &c.

When an insurance is "*at and from*," the ship is protected during her preparation for the voyage; but if all thoughts of the voyage be laid aside, the insurer is discharged. Page 51

Where there was an insurance on the outward and homeward bound voyage, and the latter ran "*at and from Jamaica to London*;" it was held, that the homeward risk began when the ship moored at any part of the island, and that there the outward risk ended, and did not continue till she came to the last port of delivery. 52

This case confirmed as to a policy on the ship, but the outward risk on goods continues till they are landed. *ibid.*

In construing policies, the *strictum jus* or *apex juris*, is not to be the rule, but a liberal construction is to be adopted, and the usage of the trade called in to explain any doubts. 54

Thus in an insurance on goods from *Malaga to Gibraltar*, and from thence to *England or Holland*, the parties having agreed that the goods might be unloaded at *Gibraltar*, and re-shipped in one or more *British* ship or ships, and it appearing in evidence that there was no *British* ship at *Gibraltar*, but the goods had been unloaded and put into a *store ship*, (which was always considered as a warehouse), the insurers were held to be liable for the loss of these goods in the store ship. 53

A ship was insured from *London* to any place beyond the *Cape of Good Hope*. The ship arrived in the river *Canton* in *China*, where, in order to be heeled and refitted, the sails, &c. were taken out, and lodged in a *bank sail*, on an island in the river (which was proved to be usual, and beneficial to all concerns), the underwriter was held to be liable for the loss of the sails by fire, in a *bank sail*. 55

Time of underwriting consideration, and

Is understood to be referred to by every policy. Page 57

If a ship be driven a mile on shore by a hurricane, or be burnt in a dry dock, while repairing, the insurer is liable. *ibid.*

Every underwriter is presumed to be acquainted with the practice of the trade he insures. 59, 605

General rules for construction of policy. 62

When a man insures one species of property, he cannot recover damage occasioned by the loss of a species of property different from that named in the policy. 69

Under a policy upon the ship, or upon the goods, the insured cannot recover extraordinary wages paid to the seamen, or provisions expended, during a detention to repair, or a detention by an embargo. 69, 70

Nor is the underwriter on goods liable for the freight paid by the owner of the goods to the proprietors of the ship, where the goods were partially lost. 70, 71

In the construction of policies, the loss must be a direct and immediate consequence of the peril insured, and not a remote one, in order to entitle the insurer to recover. 77

In the construction of a policy upon time, the same liberality prevails as in other cases; and an attention to the meaning of the contracting parties has always been paid. 79

In an insurance at and from Liverpool to Antigua, with liberty to cruise six weeks; it was held, that this meant a connected portion of time, and not a desultory cruising for six weeks at any time. *ibid.*

Of the Construction of East India Policies, see East India Policies.

Of the Construction of Policies upon the Sea.

Of the Construction of Losses by Detention, see Detention.

Of the Construction of Losses by Barratry, see Barratry.

Consular Sentences, see Admiralty.

Continuance of the Risk.

On the ship till her arrival at the port of destination, and till she has been moored 24 hours in good safety for the purpose of unloading. Page 27, 52

On the goods till they are safely landed at the port of destination; which includes the carriage in the ship's boat to the shore, but not in the boat of the owner of the goods. 27

If a policy be general on a ship from A. to B. the underwriter has been held answerable till the ship is unloaded. 41

But if it contain the usual words "till moored 24 hours in safety;" the insurer is liable for no loss that does not happen before the expiration of that time. *ibid.*

Even though it be occasioned by an act done during the voyage insured. *ibid.*

If the master, during the voyage, commit an act of barratry by smuggling, and the ship be not seized till near a month after her arrival at the port of destination, the insurer is discharged. *ibid.*

If a ship be insured for six months, and three days before the expiration of that time receive her death's wound but by pumping is kept afloat three days after, the insurer is liable.

But the ship cannot be said to be moored 24 hours in safety, if she is not moored very day, which she is, if she is moored.

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| So also an application may be made to a court of equity for a commission to examine witnesses residing abroad. | ibid. |
| It is allowable, where fraud is suspected, to apply to equity, in order to obtain a disclosure of circumstances to the oath of the insured. | |

the court of common law of its jurisdiction, unless a reference is in fact made, or is depending. Page 535

Court of Policies of Insurance.

The history of its origin and decline.

Introq. xli.

Cruise.

A liberty to cruise six weeks means to give a permission to cruise for *six successive weeks*, and not a desultory cruising for forty-two days at any time. 79

Crusades.

They contributed to the revival of commerce.

Introq. xxi

Date.

THE day, month, and year, on which the policy was executed, must be inserted. 35

Declaration.

In order to entitle the insured to recover expences of salvage, it is not necessary to state them in the declaration, as a special breach of the policy. 189

Thus, in a declaration on a policy on goods, it stated that the ship sprung a leak, and sunk in the river, whereby the goods were spoiled. Lord *Hardwicke* held, that under this declaration, the plaintiffs might give in evidence the expences of salvage. 189

A declaration on a policy of insurance must set out the policy, and aver that it was signed by the insured; and that, in consideration of a premium, he undertook to indemnify the insured.

The declaration
interest of
should not

To aver that the loss happened by the *fraud and negligence of the master* is a sufficient averment of *barratry*.

Page 538

In a declaration for a *total*, the insured may recover for a partial loss. 539
Though the plaintiff appear in proof to have a larger interest than is averred in the declaration, yet he is entitled to recover. 542. *ib.* note (a)

The general issue, *non assumpsit*, is the usual plea, except in the case of the corporations, to a declaration upon a policy. 545

The declaration need not state the clause in the policy to refer disputes to arbitration. 535

Destination.

Destination of the ship must be stated in the policy. 26

Detention.

The underwriter, by express words, undertakes to indemnify against all damages arising from the detention of kings, princes, or *people*. 102, 103
People means the governing power of the country. *ibid.*

A detention is said to be an arrest or embargo in time of war or peace, laid on by the publick authority of a state. *ibid.*

In case of an arrest or embargo by a prince, though not an enemy, the insured is entitled to recover against the insurer. *ibid.*

In case of detention by a foreign power, which in time of war may have seized a neutral ship, in order to be for enemy's property, the consequent thereon must be the underwriter.

But a detention for non-prizes, or for navigational laws of a country, does not

of the country where the ship loads.

Page 106.

British underwriter not liable for damages which owner of foreign vessel may sustain from embargo laid by *British* government on foreign ships.

109 n.

But where the assured is a subject of this country, he may recover against a *British* underwriter for the loss sustained by the detention of the *British* government.

ibid.

American citizen cannot claim from *English* underwriter, for loss occasioned by embargo of *American* government.

609

If an *American* consignor insures in *England* from his own country to this, and the ship is detained by an embargo there, the *English* consignee cannot recover upon the policy in respect of the advances he has made upon the cargo to the consignor.

ibid.

Before the insured can recover in case of detention, he must abandon to the insurer whatever claims he may have to the property insured.

109, 110

The time, within which the abandonment must be made in such cases was not till lately ascertained in *England* by any positive rule.

ibid.

A detention by particular ordinances, which contravene, or do not form a part of the law of nations, is a risk within a policy of insurance.

499, 500

Deviation

Understood to mean a voluntary departure, without necessity or any real cause, from the regular and use of the specific voyage

387

When it happens, the voyage is void, and the insurers are dis-

It is not material whether the loss be or be not an actual consequence of the deviation; for the insurers are in no case answerable for a subsequent loss, in whatever place it happen, or to whatever cause it may be attributed.

Page 387

Neither does it make any difference whether the insured was or was not consenting to the deviation.

ibid.

A ship being insured from *Dunkirk* to *Leghorn*, comes to *Dover* for a *Mediterranean* pass; and it was held to be a deviation.

388

If the master of a vessel put into a port not usual, or stay an unusual time, it is a deviation.

ibid.

The time a ship is detained in port for necessary repairs, the insurance being *at and from*, is not to be considered unnecessary delay, so as to avoid the policy.

388

Held, that where there is a policy on goods granting leave to *touch and stay* at a place, that confers no privilege on the assured to *break bulk* there.

ibid.

But an insurance on *ship and freight* is not vitiated by the ship taking in goods at a place into which she was forced by necessity, although there was no liberty to trade given by the policy.

389

If several places are named in the policy, the ship must go to those places in the order in which they are named, unless some usage, or some special facts be proved to vary the general rule.

393

An insurance from *A.* to *B. C. D.* and *E.* means a voyage to all or any of the places named; with this reserve, that if the ship goes to more than one of these places, she must visit them in the order described in the policy.

394

But for a single night,

fatal. 395, 396

risk to *Jamaica*.

if for a

201

Table of the Principal Matters.

meeting with a prize; it was held a deviation. Page 396

But if a merchant ship carry letters of marque, she may *chase* an enemy, though she may not *cruise*, without being deemed guilty of a deviation. *ibid.*

Liberty given to a merchant ship with a letter of marque, to *chase, capture, and man prizes* does not justify her in *lying to* for the purpose of protecting a prize as a convoy into port. 397

2. Whether, in case of an insurance of merchant ship *with or without letters of marque*, she may chase vessels for the purpose of capture, provided the original pursuit commences from a point in the course of the voyage? *ibid.*

Liberty to a merchant ship *to see prizes into port*, does not authorize her to stay till they receive necessary repairs, which they could not otherwise procure. 398

The doctrine of deviation is applicable to an insurance on *freight*. 399

Wherever the deviation is occasioned by absolute necessity; as where the crew forced the captain to deviate, the underwriter continues liable. *ibid.*

The justifications for a deviation seem to be these; to repair the vessel: to avoid an impending storm; to escape from an enemy; or to seek for convoy. 400, 401

If a ship is decayed, and goes to the nearest port to rest, it is no deviation. 401

Wherever a ship, in order to escape a storm, goes out of the direct course: or, when in the due course of the voyage, is driven out of it by stress of weather; this is no deviation. 402, 403

If a storm drive a ship out of the course of her voyage, and she do the best she can to get to the nearest port, she is not liable for a deviation. 411

procure medical assistance for the captain and crew, the assured must shew that the ship was supplied with such medicines and instruments as were likely to be necessary in the course of the voyage. Page 408, 409

A deviation may also be justified, if done to avoid an enemy or to seek for convoy at the place of rendezvous. Page 409

A ship was insured from London to Gibraltar, warranted to depart with convoy. There was a convoy appointed for that trade at Spithead, but the ship was lost on her way thither. The court held that the ship was protected by the insurance to a place of general rendezvous. *ibid.*

Where a captain justifies a deviation by the usage of a particular trade, there must be a clear and established usage; not a few vague instances only. 411

Wherever a ship does that, which is for the general benefit of all parties concerned, the act is as much within the spirit of the policy as if it had been expressed; and in order to say whether a deviation be justifiable or not, it will be proper to attend to the motives, end, and consequences, of the act, as the true ground of judgment. *ibid.*

It has been held, that if a ship deviates from necessity, the ship must pursue such *voyage of necessity* in the direct course, and in the shortest time possible, otherwise the underwriters will be discharged. *ibid.*

In such a case nothing more must be done than what the necessity requires. *ibid.*

Even in an insurance on a trading voyage, such trade must be carried on with usual and reasonable expedition. 415

A deviation *merely intended*, but never carried into effect, does not discharge the underwriters. 417

When the assured, after the parties have begun the voyage, voluntarily change the route, the parties are not liable for a deviation. 418

surer is discharged, though the loss should happen before the dividing point of the two voyages. Page 418
But where the termini of the voyage continue the same, an intention to go to an intermediate port, though that intention should be formed previous to the ship's sailing, will not vitiate till actual deviation. 418

See also 420 note (2)

As it is settled that a mere intention to deviate will not vacate the policy, it follows as a consequence, and has been so held, that whatever damage happens before actual deviation, falls upon the underwriters. 421

Subject to the rules already advanced, deviation or not is a question of fact to be decided according to the circumstances of the case. *ibid.*

In cases of deviation, the premium is not to be returned. *ibid.*

Double Insurance.

It is where the same man is to receive two sums instead of one; or the same sum twice over, for the same loss, by reason of his having made two insurances upon the same property. 373
Difference between a re-assurance and a double insurance. *ibid.*

Where a man makes a double insurance he may recover his loss against which set of underwriters he pleases; but he can recover for no more than the amount of his loss. 374

But when one set of underwriters pay the loss, they may call upon the other underwriters to contribute in proportion to the sums they have insured. *ibid.*

But though a double insurance cannot be wholly supported, so as to enable a man to recover a two-fold satisfaction; yet various persons may insure various interests on the same thing, and each to the whole value; as the cargo for wages; the owner for the cargo; the cargo for goods.

not, fully considered from

Page 376 to 381.

If the same man for his own account, though not in his own name, insures doubly, it is still a double insurance. 378

The laws of foreign countries, upon the subject of double insurance, are far from being uniform. 381

East India Voyages.

THE usage of trade with respect to these voyages has been more notorious than in any other, the question having more frequently occurred. 64

The charter-parties of the India Company give leave to prolong the ship's stay in India for a year, and it is common by a new agreement to detain her a year longer. The words of the policy too are very general without limitation of time or place. *ibid.*

These charter-parties are so notorious, and the course of the trade is so well known, that the underwriter is always liable for any intermediate voyage, upon which the ship may be sent, while in India, though not expressly mentioned in the policy.

64, 67

In an insurance "from London to Madras and China, with liberty to touch, stay, and trade, at any ports or places whatsoever," the facts were; that when the ship arrived at Madras, she was too late to go to China that year, upon which she was sent by the council to Bengal to fetch rice, which voyage she performed once, but in the second attempt she was lost. The insurers are answerable on account of the usage. 66

However, the parties may, by their own agreement, prevent such latitude of construction. 68

express words

Insurance on a voyage undertaken in contravention of the rights of the *East India Company*, is void. Page 308.
How their rights are affected by the treaty with *America*.- 309

Election.

Election to abandon, when to be made. 238, 239
Notice of abandonment must be given, though the ship and cargo have been sold. 240

Embargo.

An embargo is an arrest laid on ships or goods by public authority, to prevent ships from putting to sea in time of war, and sometimes also to exclude them from entering our ports.

103, 104

2. Whether a prince in time of war may make use of the vessels he finds in his ports, to assist him in carrying on war? 104

Extraordinary wages paid to the seamen during an embargo, cannot be recovered against the insurer on the ship. 71

The king of *Great Britain*, in time of war, may lay an embargo on shipping in the ports of his kingdom.

2. Whether he may do it in time of peace? 104

2. Whether, if an embargo be laid on by the *British* government, and a loss ensue, the underwriters are liable? 106, 107, 109 note (a)

The subjects of a foreign state cannot recover against an *English* underwriter for a loss occasioned by an embargo, or other act of their own government. 609

And if the foreign consignee cannot recover, because the loss is occasioned by the acts of his own government, the *English* consignee can recover the policy.

a voyage prohibited by an embargo, such an insurance is void. Page 311

Enemy.

The question whether insurances on the property of an enemy are politic, considered. 16, 320

Such insurances are contrary to the law of *England*. *ibid.*

Trading with an enemy in time of actual war without the king's licence, is absolutely illegal. 316

But the licence may be qualified, and non-compliance with the requisitions of it will vitiate the policy. 317

What is necessary to be stated in a plea of alien enemy. 321, note (a)

Evidence.

Opinion of witnesses is not evidence. 80, 260

The *onus* of proving the captain to be owner, so as to get rid of a charge of barratry, lies upon the underwriters. 127

A policy will not be set aside on the ground of fraud, unless it be fully and satisfactorily proved, and the burthen of proof lies upon the person wishing to take advantage of the fraud. 282

But positive and direct proof of fraud is not to expected; and from the nature of the thing circumstantial evidence is all that can be given. *ibid.*

The nature of circumstantial evidence considered. 283

The sentence of a foreign court of Admiralty is conclusive, and binding upon all the world, as to every thing contained in it: and cannot be controverted collaterally in a civil suit. 464, 466

See Admiralty.

The first piece of evidence to support a plea on the policy is proof of

No parole evidence of any agreement shall be admitted, which tends to contradict the written policy. *Page 546*
 The insured must also prove his interest in the thing insured, by a production of all the usual documents, bills of sale, bills of parcels, bills of lading, &c. *ibid.*

Captain's protest delivered by the broker to the assurers to get the loss settled is not evidence for the defendant. 547, 548

Nor a sentence of condemnation for non-seaworthiness after a survey of the facts stated in it. 548

A man having purchased goods abroad, in order to prove his interest, produced a bill of parcels with the receipt of the seller to it, and proved his hand; it was held to be sufficient evidence. *ibid.*

The plaintiff must prove that a loss has happened by the very means stated in the declaration. *ibid.*

But where the loss is averred to be by perils of the sea, it is allowable to give the expence of the salvage in evidence upon such a declaration. 551

Faâor.

THE lien which a factor has upon the goods of his principal, is such an interest as will entitle him to recover on a general policy on goods. 53, 379

Pilory.

Wilfully to cast away, burn, or destroy, any ship to the prejudice of the owners of the said ship, or any merchant loading goods thereon, or of the underwriter, is felony, without the benefit of clergy, in any captain, master, mariner, or other officer belonging to the ship so destroyed.

in boring holes in
 or stealing a
 12. 11. 11

Persons convicted of stealing goods from a ship wrecked, or in distress, or of obstructing the escape of any person from a wreck, or of putting out false lights to lead such ship into danger, shall suffer as felons without benefit of clergy. *Page 184*

Where goods of small value are stolen, without any circumstances of cruelty, the offender may be indicted for petty larceny. *ibid.*

Persons, in whose custody ship-wrecked goods are found, not giving a satisfactory account, shall be committed to the common gaol for six months, or pay treble the value of such goods. *ibid.*

Goods offered to sale, suspected of being ship-wrecked, shall be stopped, and the person so offering them, and not giving a satisfactory account, shall be committed to the common gaol for six months, or pay treble the value of such goods. *ibid.*

Persons convicted of assaulking any magistrate or officer, when in discharge of his duty, respecting the preservation of any ship, vessel, goods, or effects, shall be liable to transportation for seven years. 186

Fire (insurants against)

Is a contract, by which the insurer undertakes, in consideration of the premium, to indemnify the insured against all losses, which he may sustain in his house or goods, by means of fire, within the time limited in the policy. 587

The London Assurance Company insert a clause in their proposals, by which they declare, that they do not hold themselves liable for any damage by fire, occasioned by an invasion, foreign enemy, or any military or usurped whatsoever. 557

also, that the
 from loss

words add, "*civil commotion*;" it was held that the company, under those words, were exempted from losses occasioned by rioters, who rose in the year 1780, to compel the repeal of a statute, which had passed in favour of the *Roman catholics*.

Page 591

When a loss happens, the insured must give immediate notice of his loss; and as particular an account of the value, &c. as the nature of the case will admit. He must also produce a certificate of the minister and church-wardens, as to the character of the sufferer, and their belief of the truth of what he advances. 594

This certificate is held to be a *condition precedent* to his right of recovery.

595, note (a)

In insurances against fire, the loss may be either partial or total. 595

These policies are not in their nature assignable; nor can the interest in them be transferred without the consent of the office. *ibid.*

When any person dies, the interest shall remain to the heir, executor, or administrator, respectively, to whom the property insured belongs; provided they procure their right to be indorsed on the policy, or the premium be paid in their name. 596.

It is necessary, the party injured should have an interest or property in the house insured, at the time the policy is made out, and at the time the fire happens; and therefore, after the lease of the house is expired, the insured's assigning the policy does not oblige the insurers to make good the loss to the assignee. *ibid.*

The premium upon common insurances is two shillings *per cent.* for any sum not exceeding 100*l.* and half a crown from 100*l.* upwards. 603

Besides which there is a duty to government of *2*s.* per cent.* *ibid.*

This tax does not extend to *pirates*.

If a *honorarium* is given

made, there would be a return of premium.

Fraud vitiates this species of contract. *ibid.*

Fire (by)

If the captain of a ship voluntarily burn her to prevent her from falling into the hands of the enemy, this is a loss by *fire* within the meaning of the policy, 51

Foreign Ships.

Insurances on foreign ships without interest are not within the statute of 19 Geo. 2. c. 37. 351

But re-assurances on foreign ships are void. 372

Fort.

A fort may be insured against an attack from an enemy, for the benefit of the governor. 15

France.

An account of its commercial and maritime regulations; and the distinguished authors, who have written upon the subject of insurances.

Introd. xxxii.

Fraud.

Policies are annulled by the least shadow of fraud or undue concealment of facts. 242

Both parties are equally bound to disclose circumstances within their knowledge. *ibid.*

If the insurer, at the time he underwrote, knew that the ship was safe arrived, the contract will be void. *ibid.*

Cases of fraud upon this subject are liable to a threefold division; 1st, The *allegatio falsi*; 2^d, The *suppressio veri*; 3^d, Misrepresentation. The latter

when it happen by mistake, if it is a material

material will vitiate the policy as much as actual fraud. P. 242, 243

The policy was held to be void, where goods were insured as the property of an ally, when in fact they were the goods of an enemy. 243

A ship was known to have sailed from Jamaica, on the 24th of November; and the agent told the insurer she sailed the latter end of December; the policy was declared void. 244

In an insurance upon goods, the insured warranted the ship and goods to be neutral; it was expressly found by the jury, that they were not neutral. The court, therefore, though the loss happened by storms, and not by capture, declared that the insured could not recover. *ibid.*

Goods were insured on board a ship, warranted Portuguese. The goods were lost by a different peril, but in fact the ship was not Portuguese. The policy is void *ab initio*. 245

Concealment of circumstances vitiates all contracts of insurance. The facts upon which the risk is to be computed, lie, for the most part, within the knowledge of the insured only. The underwriter relies upon him for all necessary information; and must trust to him that he will conceal nothing, so as to make him form a wrong estimate. 246

One having an account that a ship, described like his, was taken, insured her, without giving any notice to the insurers of what he had heard, the policy was decreed in equity to be delivered up. 247

The agent for the plaintiff, two days before he effected the policy, received a letter from *Cowes*, in which is this expression: "On the 12th of this month I was in company with the *Davy* (the ship in question,) at twelve at night lost sight of her all at once; the captain spoke to me the day before that she was *lucky*, and the next day we had a *hard gale*." The ship, however, rode out the gale, and was ca-

held to be void, because the letter was not communicated to the insurer.

Page 247

A ship was insured "at and from Genoa." The ship loaded at Leghorn and was originally bound for Dublin; but losing her convoy, she put into Genoa in August, and lay there till the January following. All these facts were known to the insured; but not communicated to the insurer: the policy was held to be void. 248

A ship being bound from the coast of Africa to the British West Indies, sailed from St. Thomas's on the coast of Africa on the 2d of October, a circumstance with which the plaintiff was acquainted by a letter received in February. The policy was not made till the 21st of March. The letter was not shewn, nor was any thing said of her sailing from St. Thomas's; but in the instructions "the ship was said to have been on the coast the 2d of October." The policy was held to be void. 249

The broker's instructions stated the ship ready to sail on the 24th of December; the broker represented to the underwriter that the ship was in port, when, in fact, she had sailed the 23d of December. The policy was void. 250

But there are many matters, as to which the insured may be innocently silent; 1st, As to what the insurer knows, however he came by that knowledge; 2d, As to what he ought to know; 3d, As to what lessens the risk. An underwriter is bound to know particular perils, as to the state of war or peace. 251

If a privateer is insured, the underwriter need not be told her destination. *ibid.*

An insurance was made on Fort Marlborough in the East Indies for twelve months against the attacks of an Enemy, for the benefit of the

The ship, however, rode out the gale, and was ca-

being attacked by the *French*. The court held that the policy was good.

Page 251

The whole doctrine of concealment fully illustrated from page 251 to 264

In effecting insurance on homeward voyage, unnecessary to communicate letter from captain, stating that ship had received great damage on outward voyage, and stood in need of considerable repairs. 254. note (a)

An underwriter refused to pay a loss by capture, the ship being *Portuguese* and condemned for having an *English* supercargo on board, because the insured had not disclosed that circumstance. The court held that the condemnation was unjust, and was not such a circumstance as the insured was bound to disclose. 263

A representation is a state of the case, not forming a part of the written instrument of policy; and it is sufficient if it be substantially performed. 264, 270

If there be a misrepresentation, it will avoid the policy as a fraud, but not as a part of the agreement. 264

Even written instructions, if they are not inserted in the policy, are only to be considered as representations; and in order to make them valid and binding as a warranty, it is necessary that they make a part of the written instrument. 265

If a representation be false in any material point, it will avoid the policy; because the underwriter has computed the risk upon circumstances which did not exist. *ibid.*

These principles illustrated from page 265 to 272

If the misrepresentation be in a material point, it will avoid the policy; even though it happen by mistake. 272

The same rule holds if the broker conceal any thing material, though the only ground for not mentioning

should be the

But the
fact, or
omission of the

Thus where a broker insured several vessels, speaking of them all said, "which vessels are expected to leave the coast of *Africa*, in *November* or *December*" the policy was held good, although in fact the ship in question had sailed in the month of *May* preceding. Page 257

Wherever there has been an allegation of falsehood, a concealment of circumstances, or a misrepresentation, it is immaterial whether it be the act of the person himself who is interested, or of his agent; for in either case the contract is founded in deception, and the policy is consequently void. 276 This rule prevails, even though the act cannot be at all traced to the owner of the property insured. *ibid.*

How far what is said by the broker when the names of the underwriters are put upon a slip is to be considered a representation. 473, 616

A policy will not be set aside on the ground of fraud, unless it be fully and satisfactorily proved; and the burthen of proof lies on the person wishing to take advantage of the fraud. 282

But positive and direct proof of fraud is not to be expected; and from the nature of the thing, circumstantial evidence is all that can be given. *ibid.*

The question whether the premium is to be returned by the underwriter, where the insured has been guilty of fraud, considered. 283

The ordinances of foreign states declare for the most part, that it shall. *ibid.*

In *England* there has been no legislative regulation; and the courts of justice had not till lately adopted any general rule upon the subject. *ibid.*

In two or three instances, where the underwriters have been relieved in Chancery from the payment of the sums insured on account of fraud, the decree has directed the premium to be returned. *ibid.*

question came on to be considered King's Bench; but the trial ended under a decree of the court, and the insurer having refused to return the premium,

premium the court of King's Bench considered this offer in the same light as if he had paid the money into court, and therefore the question remained undecided. Page 285

But in a case where the fraud was of a very gross and heinous nature, Lord Mansfield told the jury, that the premium should not be restored to the insured. 286

In all cases of actual fraud on the part of the insured or his agent, the premium is not to be returned. *ibid.*

It is clear that if the underwriter has been guilty of fraud, an action lies against him at the suit of the insured, to recover the premium. *ibid.*

By several foreign ordinances, the punishment of fraud, in matters of insurance, is exceedingly severe; sometimes amounting even to death. *ibid.*

No punishment, except that of annulling the contract, has as yet been declared by the law of England. 287

But if any captain, &c. wilfully destroy the ship to which he belongs, to the prejudice of the owner of the ship, or of the goods loaded thereon, or of the underwriters, he shall suffer death as a felon. *ibid.*

Fraud vitiates policies on lives, as well as those on marine insurances. 582

It has the same effect on policies insuring against fire. 603

Freight.

The freight or hire of ships, is a subject of insurance. 11

In an insurance upon freight, the insured, if the ship be prevented by accident from sailing, cannot recover the value of the freight, which he would have begun to earn if the ship had sailed. 46

But if the policy be a valued policy, and part of the cargo be on board when such accident happens, the rest being ready to be shipped, the insured may recover to the whole amount. *ibid.*

So in an *open* policy if the insured under a charter-party for a freight

policy on homeward

taches while the ship is delivering her outward cargo, where the voyage out and home is under the same charter-party. Page 48.

In these cases the criterion is, whether the voyage in which the ship is lost be a part of the voyage insured.

48, 49, 604

Where ship and freight are insured by two separate sets of underwriters, and by reason of an embargo in a foreign port, there is an abandonment to both, whether the underwriters on ship are entitled to freight earned in consequence of the embargo being taken off? From p. 227 to p. 236

The underwriter upon the goods is not liable for freight paid to the owner of the ship. 70

Freight must contribute to a general average. 176, 177

Furniture of Ship.

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Established by 39 G. 3. c. 89. p. 537, 572 n.

How it shall plead. 537

Gold.

Whether insurable as goods. 25

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Goods lashed on deck are not included under a general insurance on goods. 25

Greek.

SOME account of their commerce: they are supposed to have been united with insurance. Introd. vii

Husband of a Ship.

The husband of a ship has no right to insure for any part owner, without his particular direction; nor for all the owners in general, without their joint direction. Page 20

Jettison or Jutsen. See Average.

Jewels.

Whether insurable as goods. 25
Contribute to a general average. 175

Illegal Voyages.

WHENEVER an insurance is made on a voyage expressly prohibited by the common, statute, or maritime law of this country, the policy is void. 307

It is immaterial whether the underwriter did or did not know that the voyage was illegal; for the court cannot substantiate a contract in direct contradiction to law. 311

If a ship, though neutral, be insured on a voyage prohibited by an embargo, such an insurance is void. *ibid.*

An insurance upon a smuggling voyage prohibited by the revenue laws of this country would be void. *Alister*, if merely against the revenue laws of a foreign state, with the knowledge of the underwriter. 263, 313, 314

No country pays attention to the revenue laws of another. *ibid.*

The question, how far trading with an enemy, in time of actual war, is legal, considered and discussed from page 314 to 320

The king may licence a trading with the enemy generally, or grant a qualified licence. 317

The conditions on which a qualified licence is granted must be strictly complied with.

the goods of an enemy are expedient, considered, from page 320 to 326. Whether they are expedient or not, such insurances are contrary to law. 320 A policy on a foreign ship must be understood as virtually containing an exception of all captures made by the authority of the *British* government. 320

A policy on a foreign ship containing an insurance against *British* capture, *eo nomine*, illegal and void upon the face of it. *ibid.*

Insurance on goods, the property of *Frenchmen*, shipped in *France* in time of peace, but exported after the commencement of hostilities, cannot be enforced against the underwriters upon the restoration of peace. 327

Although a neutral be resident in a place occupied by the enemy, an insurance on goods, his property, to a neutral or friendly port, is valid. 327, 328

No insurance can be made upon a voyage to a besieged fort or garrison, with a view of carrying assistance to them; or upon ammunition, warlike stores, or provisions. 328

Insurance.

Insurance is a contract, by which the insurer undertakes, in consideration of a premium, equivalent to the hazard run, to indemnify the insured against certain perils and losses, or against a particular event. *Introd. ii.* The utility of this contract. *Introd. ibid.*

The origin of it traced. *Introd. iii.* The question, whether it was known to the ancients, considered. *Introd. ibid.*

Insurances supposed to have arisen in *Italy*. *Introd. xii.*

The *Italians* brought them into the various states of *Europe*, and into *England*. *Introd. xiii. v. c.*

But it must be specified in the policy to be such an interest, otherwise the policy is void. Page 11.

Unless the usage of the trade takes out of the general rule. 14

But where the insurance is upon goods generally, the lien which a factor has upon the goods of his principal, when a balance is due, is such an interest as will entitle him to recover upon such a policy. 1

Insurances on the wages of seamen are prohibited. 14

These prohibitions do not extend to the masters of ships. *ibid.*

A governor may insure the fort against the attack of an enemy, for his own benefit. 15

Insurances on enemy's property contrary to law. 16, 17, 240

In an insurance *on goods* generally, goods lashed on deck, the captain's cloaths and ship's provisions are not included, unless specifically named. 25

Insurance from *A.* to ——— is void 26.

Insurances for time are very frequent, as on a ship for twelve months. 79

Insurances upon a voyage prohibited by the common, statute, or maritime law of the country, are void. 307

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Insurances on a voyage to a besieged fort or garrison, with a view of carrying assistance to them, or upon ammunition, warlike stores, or provision, are prohibited. 328

All insurances on slaves are now prohibited. 32. *note.*

Insurances upon prohibited goods.

See title *Prohibited Goods.*

Insurances void by stat. 19 Geo. 2. c. 37.

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Insurances on Lives. See title *Lives.*

Insurances against Fire. See title *Fire.*

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What persons may be insurers.

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What shall be considered as a partnership within the statute of 6 Geo. 1. c. 18. 8, 9

Insurers are liable for losses, which happen in the ship's boats, when landing the goods insured. 27

Aliter, if in the boat of the owner of the goods. *ibid.*

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Insured.

The name of the insured must be inserted in the policy; or the name of the agent who effects it *as agent.*

18, 19, 20

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19, 20

2. Whether an action lies against the insured for premiums at the suit of the underwriter? 33, 608

The broker, who effects the policy, may maintain such an action for premiums paid on his account. 33, 34

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The intention of the parties, and not the literal meaning of the words, is to be attended to in the construction of policies. 40

Interest or no Interest. See title *Wager Policies.*

Interest (Insurable).

A special interest in goods may be insured, such as the lien of a factor 13

Money expended for the use of the ship by the captain is insurable, as goods, specie, and effects, especially if an usage has prevailed. 14

Wages of seamen, and commodities in lieu of wages, not insurable; but the goods of the captain, or his share in cargo, may. *ibid.*

and privileges

Table of the Principal Matters.

The owner of a ship having entered into a charter-party to go from the Thames to *Teneriffe*, and there to load a cargo of wines at a specific freight, has a good insurable interest in such freight; and if the policy be underwritten at and from London to *Teneriffe*, and from thence to the *West Indies*, he may recover, if the ship be lost in her way to *Teneriffe* Page 47

The profits expected to arise on a cargo of molasses, belonging to the plaintiff, who had a contract with government to supply the army with spruce beer, are a good insurable interest 354

2. Whether plaintiff's commissions as consignee of a cargo are an insurable interest? 355

Officers and crew of a ship, upon a joint capture by army and navy, have an insurable interest in the capture, before condemnation, 358

So of captors of ships in the voyage home for the purpose of bringing them to adjudication in the court of Admiralty. 359

So the Dutch commissioners have an insurable interest in the ships seized at sea to be brought into the ports of this kingdom. 360

[This case was affirmed in the Exchequer chamber.] 361

A creditor of a house abroad has an insurable interest on goods consigned to a third person for the purpose of paying his debt, though the creditor had not ordered the goods to be sent. 362

Various persons may insure various interests on the same thing, and each to the whole value. 375

Two partners purchased a ship under a regular bill of sale, conformable to Lord *Hawkebury's* act, (26 Geo. 3. c. 60.) and they afterwards took in two other partners, who paid their respective shares in the ship, but there was no transfer to them under the statute, and it was held that the first partners had not an insurable interest in the freight.

A merchant who

interest, though the mortgage come absolute before the order for insurance arrives. Page 548

The indorser of a bill of lading has still an insurable interest, if it appear that the effect of the indorsement was only intended to bind the net proceeds, in case the goods arrived.

547, note (a)

A person holding a note given for money won at play, has not an insurable interest in the life of the maker of the note. 574

But a creditor has such an interest in the life of his debtor, that he may insure. 575

Executor of a creditor may maintain an action on a policy made by himself. *ibid.*

Lading (Bill of).

A BILL of lading is an acknowledgment under the hand of the captain, that he has received certain goods, which he undertakes to deliver to the person named in the bill of lading; it is assignable in its nature, and by indorsement the property vests in the assignee. 547, note (a)

Where several bills, of lading of different imports have been signed, no reference is to be had to the time when they were first signed by the captain; but the person who first gets one of them by a legal title from the owner or shipper, has a right to the consignment. *ibid.*

Where bills of lading on the face of them are apparently different, and yet constructively the same, and the captain has acted *bonâ fide*, a delivery according to such legal title will discharge him from them all. *ibid.*

But if the intention of the parties appears to have been to bind the net proceeds only, in case of the arrival of the goods, an insurance made on

Table of the Principal Matters.

Lighters.

Loss of goods in ship's lighters-falls upon the underwriters: *aliter*, if in the owner's lighters. Page 27

Lives (Insurances upon).

INSURANCE upon life is a contract by which the underwriter, for a certain sum, proportioned to the age, health, and profession of the person, whose life is the object of the insurance, engages that that person shall not die within the time limited in the policy; or if he do, that he will pay a sum of money to him, in whose favour the policy was granted. 571

The advantages resulting from this species of contract stated. *ibid.*

It is impossible to ascertain its antiquity. 573

No insurance shall be made on the life or lives of any person or persons; wherein the person, for whose use the policy is made, shall have no interest, or by way of gaming or wagering; but such insurance shall be null and void. *ibid.*

The holder of a note for money won at play has not an insurable interest in the life of the maker of the note. 574

But a *bond fide* creditor has an insurable interest in the life of his debtor. 575

But if after the death of the debtor his executors pay the debt, the creditor cannot afterwards recover upon the policy, although the debtor died insolvent, and the executors were furnished with the means of payment from another quarter than the estate of their testator. 576

Declarations of the person whose life was insured as to his state of health when the insurance was effected, going to show a fraud committed on the insurer, are recoverable in evidence in an action on the policy. 578

In a life insurance, the insurer undertakes to answer for all those accidents, to which the life of man is exposed, except suicide; and the death must happen

If a man receive a mortal wound during the existence of a policy, but does not in fact die thereafter, the insurers are not liable. Page 578

But if a man whose life is insured, goes to sea, and the ship in which he sailed is never heard of afterwards, the question whether he did or did not die within the term insured, is a fact for the jury to ascertain from the circumstances. 579

This sort of policy being on the life or death of man, does not admit of the distinction between total and partial losses. *ibid.*

In a life insurance it has been held, that if the insurer become bankrupt before the loss happens, the person interested might prove the debt under the commission, as if the loss had happened before it issued. 580

A policy was made for one year from the day of the date thereof; the policy was dated 3d Sept. 1697. The person died on the 3d Sept. 1698, about one o'clock in the morning; and the insurer was held liable. 581
It is now usual to insert in the policy "the first and last days included." 582

Fraud equally vitiates policies on lives, as in the case of marine insurances. *ibid.*

Where there is a warranty that the person is in good health, it is sufficient that he be in a reasonable good state of health, for it never can mean that he is free from the seeds of disorder. 583

If the person whose life was insured, laboured under a particular infirmity, if it be proved by medical men, that in their judgment it did not at all contribute to his death, the warranty of health has been fully complied with, and the insurer is liable. *ibid.*

If the person, whose life was insured, did commit suicide, or be put to death by the law, or by the sentence of justice, the insurer is not liable. 584

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London. 441, 442

London Assurance Company.

Erected by royal charter, authorized
by Stat. 6 Geo. 1. ch. 18. 6, 7, 8.
This, and the Royal Exchange Assu-
rance Company, are the only societies
which may insure. 7
The privileges of the *South Sea* and *East*
India Companies preserved. 10
This company has a common seal. 6
It rejects the words "*or the ship be*
stranded," in the memorandum at
the foot of the policy. 24
This company, when sued in an action
of debt, may plead generally, that
they owe nothing, and give the special
matter in evidence. 535, 536
So when sued in *covenant*, they may
plead generally, "*that they have not*
broken the covenant." *ibid.*
The company obtained his majesty's
charter to enable them to make insu-
rances upon lives. 572

Loss.

The loss must be a *direct and immediate*
consequence of the peril insured, and
not a remote one, in order to entitle
the insured to recover. 77
It is not a loss within the policy, that
the port of destination has been shut
by order of the enemy against the
ships of the nation to which the ship
insured belongs. 213, 240

Loss by Perils of the Sea, vide *Perils of*
the Sea.

Loss by Capture, vide *Capture*.

Loss by Detention, vide *Detention*.

Loss by B

Lost or not Lost.

These words peculiar to *English* policies.
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Master of Ships.

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Neither the master's cloaths, nor goods
lashed on deck, are included under a
general insurance *on goods*. 25
Whatever is done by the master of the
ship in the usual course of the voyage,
necessarily *et ex justa causa*, though a
loss happen thereon, the underwriter
shall be answerable. 40
A *mistake* of the master cannot be called
a *peril of the sea*. 83
Of barratry of the master, see *Bar-*
ratry.
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excepted from the allowance of sal-
vage. 188

Memorandum.

The memorandum at the foot of the
policy exempts the underwriters from
partial losses not amounting to 3 per
cent. unless it arise from a general
average. 24, 135
It also provides, that the underwriters
will not answer for any partial loss on
corn, fish, salt, fruit, flour or seed,
unless occasioned by a general average
or the stranding of the ship; nor are
they liable for any partial loss on su-
per hemp, flax, hides, and
per cent. 24

out of 100 be
by

wholly spoiled, will the underwriter be liable? *Page 146*

Corn is a general expression, and has been held to include *peas* and *beans* and *malt*. *149*

The word *Salt* has been held not to include *Salt-petre*. *ibid.*

It has been held that the underwriters are not answerable, within that part of the memorandum which exempts them from all partial losses to *corn*, *fish*, *salt*, *fruit*, or *seed*, as long as the commodity specifically remains, although wholly unfit for use. *ibid.*

This was held with regard to a cargo of *wheat*, partially damaged by a storm. *ibid.*

A cargo of *fish* arrived, but was stinking, and wholly unfit for use, the insurer was held not to be liable. *151*

So of a cargo of *fruit*. *155*

A cargo of *peas* arrived at the port of destination; but they were so much damaged, that the produce was three-fourths less than the freight; the insurer was held to be discharged. *160*

The effect of the memorandum discussed. *156*

Misdemeanor.

Any person, except those mentioned in the stat. 12 *Ann.* stat. 2. ch. 18. entering a ship in distress, without leave of the superior officer, or of the officer of the customs, or molesting or hindering them in the preservation of the ship, or defacing the marks of the goods on board, shall make double satisfaction, or be sent to the house of correction for 12 months. *183*

If goods stolen from such ship shall be found on any person, they shall be delivered to the true owner, or such person shall pay treble the value. *ibid.*

Missing Ship.

A ship that has been missing for considerable time, shall be considered having foundered at sea. In practice, this time has been fixed to six months.

twelve months, if the greater distance. *Page 86*

Mistake.

2. Whether insurers liable for those of the captain? *83*

Misrepresentation, vide title *Fraud*, &c.

Money.

Whether insurable as goods. *25*
Contributes to general average. *177*

Mooring.

What shall be deemed mooring in good safety. *45*

Name.

THE name of the insured must be inserted in the policy; or the name of the agent affecting it, *as agent*. *18, 19, 20*

It is now sufficient to insert the name of the person actually interested, or that of the consignor or consignee of the goods, or the names of those who receive the orders to insure, or who shall give the orders to effect the insurance. *19, 20*

The name of the ship and master must be inserted in the policy. *20*

But the insurance is not vitiated if the name of the ship be mistaken. *19*

The ship may be changed in the voyage, if necessity require it.

Navigation.

Insurances which tend to a breach of the navigation acts are void. *335 to 339*

Neutrality.

A neutral ship is not obliged to stop to be searched; the searcher does it at his peril, it is a case of improper detention, for the costs of which the insurer is liable. Page 104, 498
This point is now decided otherwise, and a ship must stop to be searched.

500, 501

It is not a breach of neutrality for a neutral ship to carry enemy's property from her own to the enemy's country, though she be thereby liable to be detained and carried into a *British* port for the purpose of search. 328

If a man warrant the property to be neutral, and it is not, the policy is void *ab initio*. 460

In an insurance upon goods, the insured warranted the ship and goods to be neutral, it was expressly found by the jury that they were not neutral. The court, therefore, though the loss happened by storm, and not by capture, declared that the contract was void. *ibid*

If the ship and property are neutral when the risk commences, this is a sufficient compliance with a warranty of neutrality. 460, 462

The insurer takes upon himself the risk of war and peace. 461

If the property be neutral at the time of sailing, and a war break out the next day, the insurer is liable. 462

For the effect of the sentence of a foreign court of Admiralty upon the question of neutrality, see ADMIRALTY.

Notice,

abandonment when to be given. 239

Open Policy.

In an *open* policy, the value of the property is not mentioned; but must be proved at trial. Page 1, 137

Opinion, see Evidence.

Owner.

A ship's husband has no right to insure for the rest of the owners, without their direction. 20

Partial Losses.

AVERAGE loss, in policies of insurance, means a particular partial loss. 133

It is less ambiguous to call it a *partial* than an average loss. *ibid.*

Partial loss, when applied to the ship, means a damage, which she may have sustained in the course of the voyage, from some of the perils mentioned in the policy: when to the cargo, it means the damage which the goods have suffered from storm, &c. though the whole or the greater part thereof may arrive in port. 135

These losses fall upon the underwriter, if they amount to 3l. *per cent.* 135, 149

But if a loss, arising from a *general average*, should be under 3l. *per cent.* still the underwriter is liable. 135

Suppose 101 chests of goods be shipped, and three of them be wholly spoiled: 2. Will the underwriter be liable?

How average settled where several articles are insured for one sum, with a distinct valuation on each, and the policy does not attach upon all. *ibid.*

In case of a partial loss, the value of the policy can be no guide to ascertain the damage, but it becomes the best of proof as in case of an open

are partially damaged the must pay the owner such

proportion of the prime cost or value in the policy, as corresponds with the proportion or diminution in value occasioned by the damage. Page 137

The proportion is ascertained in this way; where an entire thing, as one hoghead of sugar, happens to be spoiled, if you can fix whether it be a third or fourth worse, then the damage is ascertained. 138, 142

This can only be done at the port of delivery where the whole damage is known and the voyage is completed. 138

Whether the price of the commodity be high or low, it equally ascertains the proportion of damage. This proportion the underwriter must pay, not of the value for which it sold, or the market price of the commodity; but of the value stated in the policy. *ibid.*

When it is an open policy, the invoice of the original cost, with the addition of all charges, and the premium of insurance, shall be the ground of the computation. *ibid.*

But whether the goods arrive at a good or bad market, it is immaterial to the insurer. *ibid.*

The true way of estimating the loss is to take the value of the commodity at the fair invoice price. *ibid.*

These rules can only apply to cases where there is a specific description of goods. 146

Where the property is of various kinds, an account must be taken of the value of the whole, and a proportion of that as the amount of the goods lost. *ibid.*

In adjusting a partial loss on goods arising from sea damage, the calculation is to be made on the difference between the respective *gross proceeds* of the same goods when found and when damaged, and not on the *net proceeds*. *ibid.*

In case of total loss the valuation in the policy is adhered to, unless there be proof of fraud.

The rate allowed by insurers for interest on the value of goods

time of loss, by consuming the stores, &c. 148

2. Whether goods partially damaged may be opened, except in the presence of the insurers or their agents. 148

No loss shall be deemed total so as to charge the insurers within the meaning of that part of the memorandum which exempts them from partial losses happening to corn, fish, salt, fruit, flour, and seed, so long as the commodity specifically remains, though perhaps wholly unfit for use. 149

This was held with respect to a cargo of wheat, which was partially damaged in a storm. *ibid.*

The same with respect to a cargo of fish, which was sinking, and of no value when examined. 151

But when a cargo of fruit was so much putrid from sea damage that it was obliged to be thrown overboard, the underwriters held liable. 153

A cargo of *prae* was so much damaged, that the produce was three-fourths less than the *freight*; but as it in fact arrived at the port of destination, the underwriter was held not to be liable. 160

In policies upon lives, there cannot, from the nature of the event, be a partial loss. 579

But there may in insurances against fire. 595

Of adjusting a partial Loss. See Adjustment.

Partnership.

No society or partnership can write, except the Royal Exchange and the London Assurance Companies.

What shall be a partnership within 1 Statute 6 Geo. 1. ch. 18. 8, 9.

Payment of Money into Court.

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People.
People. Clause of a policy respecting retention means the governing power of the country. Page 103

Perils of the Sea.

Every accident, happening by the violence of wind or waves, by thunder and lightning, by driving against rocks, or by the stranding of the ship, may be considered as a peril of the sea. 82

For such losses the underwriter is answerable, *ibid.*

A ship driven by the wind on an enemy's coast, and there captured, having sustained no damage from the wind, shall be said to be lost by capture. *ibid.*

Two of the men employed in mooring a ship in a harbour were impressed, whereby she went ashore and was lost. This held a loss by *perils of the sea*. 82. n

The mistake of the captain not a *peril of the sea*. 83

A loss of slaves by death from failure of provisions, occasioned by delay from stormy weather, is not a loss by *perils of the sea*. 84

Destruction of a ship by worms infesting the rivers of *Africa*, is not a *peril of the sea*. 85

A ship which is never heard of, after her departure, shall be presumed to have perished at sea. *ibid.*

This was held in an action on a policy upon the ship from *North Carolina* to *London*; and the loss was stated to be by sinking at sea; the evidence to support this averment was, that after sailing from port she had never been heard of. 85

The same was held in a case, where a ship had been captured and transferred at sea, but was never afterwards heard of, and never arrived at her port of destination. *ibid.*

In *England* no time is fixed.

A practice, however, prev. among merchants, that a ship shall be deemed lost, if not heard of within six months after her departure for any part of *Europe*, or within twelve, if for a greater distance. Page 86

Petty Average

Consists of such charges as the master is obliged to pay, by custom, for the benefit of the ship and cargo, such as pilotage, beaconage, &c. 133

These never fall upon the underwriter. 184

Another sense, in which this word is understood, is when we speak of a small duty, which merchants, who send goods in the ships of other men, pay to the master, over and above the freight, for his care and attention. *ibid.*

This is a charge which never falls upon the underwriter. *ibid.*

Pilot. Vide Sea worthiness.

Pirates.

The underwriter, by express words in the policy, undertakes to indemnify against the attacks of pirates. 83

Plea. See Declaration.

Policy.

A policy is the instrument by which the insurance is effected. 1

Policies are of two kinds; *valued* and *open* policies: the difference between them. *ibid.*

They are only simple contracts; but of great credit. *ibid.*

Cannot be altered when once they are signed. *ibid.*

Unless there be some written document to shew that the meaning of the parties was mistaken; or unless they be altered by *consent*. 3

A policy is a species of property for which trover will lie at the instance of the insured, if it be wrongfully taken from him. 4

The written clauses in a policy will control the printed words. P. 4. 5

The form of the policy now used is two hundred years old. 17

Very irregular and confused, and often ambiguous. *ibid.*

There are nine requisites of a policy. 17, 18

The name of the person insured. 18

This is regulated by stat. 25 Geo. 3. c. 44. and 28 Geo. 3. c. 56. 18, 19, 20

Upon the former act it has been held, that if an agent effects a policy for the principal residing abroad, his name must be inserted in the policy as agent. 19

Q. When the principal resides abroad, must not the agent live in England? *ibid.*

The names of the ship and master; unless the insurance be general, "on any ship or ships." 20

Whether the insurance be made on ships, goods or merchandizes. 23

As to the memorandum at the foot of the policy, see *Memorandum*. 23

A policy on goods generally does not include goods lashed on deck, the captain's cloaths, or the ship's provisions. 25

A policy must contain the name of the place at which the goods are laden, and to which they are bound. 26

A policy from L. to — is void. *ibid.*

When the risk commences, and when it ends. On the goods it usually begins from the loading, and continues till they are safely landed: on the ship, from her beginning to load at A. and continues till she arrive at the port of destination, and be there insured 24 hours. 27

The various perils against which the underwriter insures. 30

Q. Whether the underwriter is liable for losses committed by the people on board, and for loss arising from bad stowage, &c. 31

The policy is frequently made in duplicate, one for the insured, and one for the underwriter.

The policy must contain the name of the ship.

The policy must contain the name of the master.

The policy must contain the name of the place to which the goods are to be sent.

The policy must contain the name of the place from which the goods are to be sent.

The policy must contain the name of the place to which the goods are to be sent.

The policy must contain the name of the place from which the goods are to be sent.

The day, month, and the policy was executed. 37, note

The policy must be duly stamped. *ibid.* Unstamped *not* binding on underwriter, nor receivable in evidence. 37, note

In what cases policy may be altered. 38, 39

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As to the Construction of the Policy, see *Construction*.

Of Policies on East India Voyages, see title *East India Voyages*.

Of Policies upon gaming or wagering Contracts, see title *Wager Policies*.

Practice.

Account of the modern improvements in the practice and proceedings upon policies of insurance. *Introd.* xliii.

Premium.

The premium is the foundation of the promise or *assumpsit*. 33

It is in the policy acknowledged by the insurer to be received at the time of underwriting. *ibid.*

Q. Whether after this the insurer could maintain an action against the insured himself for the premiums. *ibid.*

In practice, the insured generally acts by a broker, and by the custom, action may be maintained against him, notwithstanding the acknowledgment in the policy.

The broker may also maintain an action against the assured for premium paid on his account.

And the underwriter may maintain an action directly against the broker for premiums. 38

Account for the premium contained

See Fraud.

When the Premium shall be returned, see title Return of Premium.

Profits.—See Interest (Insurable).

Prohibited Goods.

All insurances upon commodities, the importation or exportation of which is prohibited by law, are void.

Page 329

This rule prevails, whether the insurer did or did not know that the subject of the insurance was a prohibited commodity.

ibid.

The parliament of England has passed a law, inflicting a penalty of 500*l.* on the insurer, who should, by way of insurance, procure the importation of prohibited goods; and a like penalty on the insured.

330

By a subsequent law, the importation of any foreign alamoses or lustrings, by way of insurance or otherwise, without paying the duties, is expressly prohibited.

331

Whoever, by way of insurance, undertakes to export wool from England to parts beyond the seas, shall be liable to pay 500*l.*

332

The like penalty is inflicted on the insured.

333

Besides which all insurances on woollen goods are declared void.

ibid.

Persons making such insurances on wool, &c. are liable for the first offence to a fine of 50*l.* and six months' solitary imprisonment. The same penalty on the insured; and the insurance is void.

ibid.

Insurances made to protect smuggled goods are void.

335

Insurances, which tend to a breach of the navigation acts, are void.

335 to

It is a contravention of these acts

339

to take

ships from the British West Indies for Gibraltar.

Page 337 note

Insurances on goods prohibited by royal proclamation in time of war are void.

340

Goods which from their nature are contraband, enumerated. 340, 341 Insurances upon goods, the exportation or importation of which are prohibited only by the revenue laws of other countries, are valid in England.

341

The opinions of foreign writers upon this question, considered. 341, 342

Proof. See Evidence.

Protest.

Protest shewn by plaintiff to defendant not evidence for the defendant.

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Provisions of a Ship

Are not included under a general insurance on goods.

25

But provisions sent out in a ship for the use of the crew are protected by a policy on the ship and furniture.

74

Provisions expended during a detention to repair, or detention by an embargo, cannot be recovered against the insurer on the ship or goods. Whether they fall into a general average?

174

Ship's provisions do not contribute to a general average.

176

Ransoms

Are prohibited by statute; and money paid for ransoming a ship cannot be recovered from the underwriters.

91, 219

Re-assurance.

RE-ASSURANCE is a contract by which the first underwriter enters under to relieve himself from the

3 X 2

thole

those risks which were previously undertaken by throwing them upon other underwriters, who are called Re-assurers. Page 369

This species of contract is countenanced in most parts of Europe. *ibid.*

The opinions of foreign writers upon re-assurance stated. *ibid.*

They were admitted in England till the 19 Geo. 2. c. 37. s. 4. which declares it to be unlawful to make re-assurance, unless the assurer should be insolvent, become a bankrupt, or die: in either of which cases, such assurers, executors, administrators, or assigns, might make re-assurance to the amount before by him assured, expressing in the policy that it is a re-assurance. 370

The reasons for these exceptions as to bankrupts and deceased underwriters, stated 371

Re-assurances on foreign ships are prohibited by this act, except in the three instances mentioned in the statute. 372

In France, and other countries, it is allowed to the insured to insure the solvency of the underwriter. 373

Not allowed in England. *ibid.*

Distinction between a re-assurance and a double insurance. *ibid.*

Where a policy void as a re-assurance, the premium is not recoverable. 513

Recapture. See Capture.

Registration.

The law of England does not require that a policy should be registered. 39

Rendezvous.

Sailing from place of rendezvous is a departure with convoy. 44

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Rescission of a Policy

The name of the person insuring

The name of the ship and whether they are ships or merchandizes, on which the insurance is made. P. 20 23

The name of the place at which the goods are laden, and to which they are bound. 26

The time when the risk commences, and when it ends. 27

The various perils to which the underwriters are exposed. 30

The consideration or premium for the hazard run. 33

The time when the policy was executed. 35

That the policy be duly stamped. *ibid.*

Respondentia. See Bottomry.

Return of Premium.

The question, whether the premium is to be returned by the underwriter, where the insured has been guilty of fraud, considered. 283

The ordinances of foreign states declare, for the most part, that it shall. *ibid.*

In England there has been no legislative regulation; and the courts of justice had not till lately adopted any general rule upon the subject. *ibid.*

In two or three instances where the underwriters have been relieved in Chancery, from the payment of the sums insured on account of fraud, the decree has directed the premium to be returned.

The question came on to be considered in the King's Bench; but the result being had under a decree of the court of Chancery, and the insurer having there made an offer of returning a premium, the Court of King's Bench considered this offer to be the same lig as if he had paid the money in court; and therefore the question was undecided. *ibid.*

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orer ld not be restored to the
 Affr Page 28;
 In a f actual fraud on the part of
 the or his agent, the under-
 writer may in the premium. 286

It is clear, that if the underwriter has been guilty of fraud, an action lies against him, at the suit of the insured, to recover the premium. *ibid.*

In cases of deviation the premium is not to be returned. 421

Where property has been insured to a larger amount than the real value, the insurer shall return the overplus premium.

If goods are insured to come in certain ships from abroad, but are not in fact shipped, the premium shall be returned *ibid.*

If the ship be arrived before the policy is made, the insurer being apprized of it, and the insured being ignorant of it, he is entitled to have his premium restored. *ibid*

But if both parties are ignorant of the arrival, and the policy be *lost* or not *lost*, it should seem the underwriter ought to retain it. *ibid.*

Clau es are frequently inserted by the parties, that upon the happening of a certain event there shall be a return of premium. *ibid.*

If the ship or property insured was never brought within the terms of the contract, so that the insurer never ran any risk, the premium must be returned. *ibid.*

A clause was inserted that 8l. per cent of the premium should be returned, if the ship failed from any of the *West India* islands with convoy for the voyage and arrives. The court held, that the arrival of the ship, whether with or without convoy, entitled the party to a return of the premium stipulated. 500

So although there has been a capture and recapture during the voyage infured. 50

Whether the cause of the risk not being run is attributable to

When the condition in the clause overrides all the others.

When a policy is void as a wager policy, the court will not allow the insured to recover back the premium. § 10

Nor in the case of a re-assurance. 513

Where a policy was made to cover a trading with the enemy the insurance is void, and the assured cannot recover the premium. 514

So where the insurance is contrary to the navigation laws. 615

Where the risk has *once* commenced,
there shall be no apportionment or
return of premium afterwards. *ibid.*
Therefore no return in deviations. *ibid.*

But if there are two distinct points of time, or, in effect, two voyages either in the contemplation of the parties, or by the usage of trade, and only one of the two voyages was made, the premium shall be returned on the other, though both are contained in one policy.

Thus held in an insurance "at and
" from London to Halifax, warranted
" to dep't with convoy from Portf.
" mouth," when the ship arrived at
Portsmouth the convoy was gone. The
premium for the voyage from Portf.
mouth to Halifax was returned. 378

A ship was insured for twelve months, at 4l. per cent. warranted free from American captures. The ship was taken within two months by the Americans; but there shall be no return of premium, because the contract was entire; the premium was a gross sum stipulated and paid for twelve months.

So also it was held where a ship, insured for twelve months, was taken at the end of two; though the whole premium of 18*l.* was acknowledged to be received at the rate of 15*s.* per month; for that is only a mode of computing the gross sum. C11

When the contract is entire, whether
a specified time, or for
3-4 3 voyage

Table of the Principal

and detained beyond the day
insurer was discharged.

Page 429

This rule is adopted by foreign writers.

430

If the warranty be to fail after a specific day, and the ship fail before, the policy is equally avoided as in the former case.

ibid.

Upon a warranty to sail on or before a particular day, if the ship fail before the day from her port of loading with all her cargo and clearances on board, to the usual place of rendezvous at another part of the island merely for the sake of joining convoy, it is a compliance with the warranty, though she be afterwards detained there by an embargo beyond the day.

431

But if her cargo was not complete it would not be a commencement of the voyage.

ibid.

The same doctrines prevail, even though a condition be inserted in one of the ship's clearances, that she should pass by the place (at which she was detained by the governor beyond the day named in the warranty), to take the orders of government.

436

Thus also where an embargo was actually published before the ship sailed, and the captain, immediately after crossing the bar, returned to make a protest, and knowingly sent his ship into the embargo; yet, as he swore that he believed the embargo was to be taken off, the underwriter was held liable.

440

What shall be a sailing from the port of London. Q.

441

Sailing Instructions.

Mental in convoy.

443 seq.

Sailors

Insurance on the wages of sailors are forbidden.

14

Slaves, or any commodity to be taken away by a

he has ship if

The wearing of the sailors is excepted from the allowance of salvage.

188

Salt.

The word *Salt* used in the memorandum of a policy of insurance has been held not to include *Salt-petre*.

149

Salvage.

Salvage is an allowance made for saving a ship or goods, or both, from the dangers of the seas, fire, pirates or enemies; it is also used sometimes to signify the thing itself which is saved. But the former is the sense in which it is here used.

180

In an action of trover, it has been held that the defendants might retain the goods till payment of salvage, as well as a taylor the cloaths which he has made.

ibid.

When a ship has been wrecked, the law of England by various statutes declares, that reasonable salvage only shall be allowed to those who save the ship or any of the goods; and what shall be a reasonable allowance must be ascertained by three justices of the peace.

181 to 187

The clause of 12 Ann. stat. 2. c. 18. referring the quantum of compensation to three justices of the peace only applies to cases where application is made by or on behalf of the commander of any vessel in distress to certain public officers, and where the salvage is made through them and others employed by them.

183; note (a)

But now by 48 Geo. 3. c. 130. it is provided, that in all cases the quantum of compensation shall be referred to three justices of the peace.

617

If any prize taken from the enemy shall appear to have belonged to any of his majesty's subjects, it shall be restored to the former owner, upon his paying of salvage, one-third of the value if retaken by one of his majesty's

344

of the Principal Matters.

jeff
vatee), on the
Wearing apparel
men are always excepted from the al-
lowance of salvage. 188

The valuation of a ship and cargo, in
order to ascertain the rate of salvage,
may be determined by the policies of
insurance made on them respectively;
if there be no reason to suspect they
are undervalued. If there be no po-
licy, the real value must be proved by
invoices, &c. 188, 189

Underwriters by their policy, expressly
undertake to bear all expences of sal-
vage. 189

In order to entitle the insured to recover
expences of salvage, it is not necessary
to state them in the declaration, as a
special breach of the policy. *ibid.*

Thus in a declaration on a policy on
goods, it stated, that the ship sprung
a leak, and sunk in the river, whereby
the goods were spoiled. Lord *Hard-
wick* held that under this declaration,
the plaintiffs might give in evidence
the expences of salvage. *ibid.*

But if the insurer pay to the insured
such expences, and from particular
circumstances, the loss be repaired by
unexpected means; the insurer shall
stand in the place of the insured, and
receive the sum thus paid to atone
for the loss. 190, 212

Where the salvage is high, the other ex-
pences are great, and the object of
the voyage is defeated, the insured is
allowed to abandon to the insurer,
and call upon him to contribute for a
total loss. 191

See Abandonment.

There is neither average nor salvage
upon a bottomry bond in England. 564

Ship, in France and Denmark. 565

See, vide Perils of the Sea.

Sea-worthiness.

Every ship insured must, at the
moment of the insurance

to perform the voyage, and
external accident should
if she have a latent
unknown to the parties, that will vacate
the contract, the insurers are dis-
charged. Page 288

Ship insured *to and from*, the policy is
not void because the ship is under re-
pair at the place to make her fit to
go to sea. 299, note (a)

This arises from an *implied* war-
ranty, that the ship shall be in a con-
dition to perform the voyage. 288

But the insured ought to know whether
she was sea-worthy or not at the time
she set out upon her voyage; yet if
it can be shewn that the decay to
which the loss is attributable, did not
commence till a period subsequent to
the insurance, the underwriter will be
liable if she should be lost a few days
after her departure. 289

If a ship become leaky immediately af-
ter sailing, and founders without any
visible cause, the jury may presume
she was not sea-worthy. 289, note (a)
The whole doctrine of sea-worthiness to
be collected from the case of the
Mills *figate*, which is fully stated
from page 290 to 296, and see also
297, 298.

Where there is an insurance upon a ship
at and from, it is sufficient if she be
sea-worthy at the time of sailing.
299, note (a)

The doctrine of sea-worthiness, as esta-
blished by the law of England, is con-
sonant to the laws of all commer-
cial and maritime states in Europe.

Where the ship is not sea-worthy, the
policy is void, as well as the in-
surance is upon the goods as wh
it is upon the ship itself. 3

But insufficiency in a former voyag
will not vacate the contract. 30

The ship must be properly equippe
have a sufficient crew, a captain and
pilot of competent skill. 301

equipped as to be rendered
possible

